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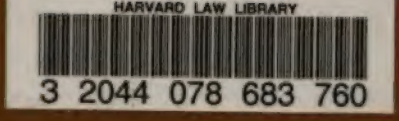
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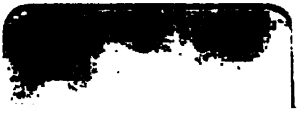

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OF

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OF

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ILLINOIS.

WILLIAM BLAND *et al.*

v.

DAVID BLAND *et al.*

103 11
34a 536
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Filed at Ottawa May 12, 1882.

1. WILL—*rule of construction.* In the construction of a will to ascertain the intention of the testator, it is not proper to look at some particular clause or clauses alone, but it must be considered in all its parts, taken together. A construction should not be adopted, if possible to be avoided, that will deny effect being given to any clause thereof, but one should be given that would harmonize the several clauses, and give effect to each.

2. SAME—*construed as to who shall take an estate.* A testator provided in his will as follows: "First, after all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give, bequeath and dispose of as follows, to-wit: To my wife and five youngest children," naming them, "the farm and all its appurtenances thereunto belonging," giving a description of the farm. "All the rest, residue and remainder of my personal estate to my beloved wife and the five above named heirs,—that is to say, to my wife during her natural life, and to the minor heirs until they become of lawful age to account for themselves. To my other heirs and oldest children, heirs at law, I give and bequeath the sum of five dollars each," etc., and concluding, "and at the time of the youngest heir becoming of lawful age, the property, both real and personal, to be divided amongst my children, share and share alike:" *Held*, that the testator's intention was that the farm, as well as the personalty, should be divided and pass to all his children, share and share alike, when the youngest child

became of age, and that the devise of the farm to the widow and five youngest children was not a devise to them absolutely, but a qualified devise to them until the youngest child should come of age, and that the limitation of the devise was the same as to both the real and personal estate.

3. SAME—*when word "heir" means child.* In such will the word "heir," in the clause providing that the property be divided when the youngest *heir* should become of age, means "child," and a partition may be had when the youngest child is of age, although one of the devisees may have died, leaving a minor heir.

APPEAL from the Circuit Court of Peoria county; the Hon. JOHN BURNS, Judge, presiding.

This was a bill in chancery for a partition of certain real estate, and assignment of dower therein, brought in the circuit court of Peoria county by appellants, representing the four elder children of John Bland, deceased, against appellees, representing the widow and five younger children of said deceased, and basing their right to the relief asked upon the provisions of the will of such decedent. The bill sets out the will, the provisions of which, material to be considered, are as follows: "First, after all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give, bequeath and dispose of as follows, to-wit: To my beloved wife and five youngest children,—that is to say, Rachel Ann Bland, Charlotte Bland, Elizabeth J. Bland, David Bland, and Eliza Paradine Bland,—the farm and all its appurtenances thereunto belonging, known and described as follows, to-wit: it being 157 acres, being and lying in the south-west quarter of section 34, in township 11, north of the base line, in range 8, east of the fourth principal meridian. All the rest, residue and remainder of my personal estate also to my beloved wife and the five above named heirs,—that is to say, to my wife during her natural life, and to the minor heirs until they become of lawful age to account for themselves. To my other heirs and oldest children, heirs at law, I give and bequeath the sum of five dollars each; to Margaret Bland five dollars, to William Bland five dollars, to Mary

Ellen Pierce five dollars, and to John A. Bland five dollars and two yearling colts, (one is a bright bay, the other is brown, with a bald face and white hind legs); and at the time of the youngest heir becoming of lawful age, the property, both real and personal, to be divided amongst my children, share and share alike." The will bears date October 8, 1862. The bill avers that John Bland died in 1863 or 1864, that the real estate described in the will is all the real estate owned by him at the making of his will and at his death, and that the youngest child long since became of lawful age. The circuit court sustained a demurrer to the bill and dismissed the same, and the complainants appealed.

Messrs. STEVENS & LEE, for the appellants:

The intention of the testator, as gathered from the whole will, must govern, and, if possible, effect should be given to every part. It being admitted by the demurrer that there was no other real estate than that mentioned in the first clause of the will, it will be presumed the testator referred to it in providing for a division.

If the first and third clauses of the will are repugnant, the latter must be considered as modifying or abrogating the former. *Brownfield* v. *Wilson*, 78 Ill. 467; *Smythe* v. *Taylor*, 21 id. 296; *Caruthers* v. *McNeil*, 97 id. 256; *Johnson* v. *Johnson*, 42 id. 425; *Poole* v. *Blakie*, 53 id. 295; *Wesch* v. *Belleville Savings Bank*, 94 id. 191.

There are two constructions that may be given to the will without doing injustice to any one:

First—The widow took a life estate in the personal property by the express terms of the will; now, giving her dower in the real estate, and, under the last clause of the will, dividing the balance equally among all the children, would work no injustice to any one.

Second—If the first and second clauses of the will should be considered as connected, and constituting but one clause,

then the widow would take a life estate in both the real and personal property. By the last clause of the will, the youngest child having long since become of age, the property should be divided among all the children equally, subject to the life estate of the widow. It is immaterial to complainants which interpretation shall prevail. But to give the will the construction contended for by the respondents, would be an act of injustice to the older children never intended by the testator.

Messrs. COOPER & TENNERY, for the appellees:

The rule that in case of repugnancy in different parts of a will the last part is to be held as modifying or defeating the first, is not one of general application, and is adopted only in extreme cases, and from necessity. *Rountree* v. *Talbot*, 89 Ill. 246.

The first clause unqualifiedly gives "the farm and all its appurtenances" to the testator's wife and five younger children. The second clause was not designed to change the first, but rather to fix the time when the division of the farm between the parties thus designated was to be made. It could not have been intended to operate as a grant of any interest in the land to any one.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The question presented is simply one of the construction of the will,—whether, as appellants claim, all the children of the testator, the older as well as the younger set, are to share equally in the land described in the will, or whether, as appellees claim, the widow and the five younger children take the land in fee and in equal parts among them to the exclusion altogether of the four older children.

Looking at the first clause of the will by itself, the widow and five youngest children take the whole land absolutely, and taking the first and second clauses by themselves, the

more natural construction would be the same, that the widow and five youngest children take the land absolutely, and as to the personal estate, that that was given to them only during the natural life of the widow, and until the minor heirs became of age. But this looking at, and resting upon, some particular clause or clauses of an instrument is not the right mode of construing it,—it must be looked to in all its parts, and the entire will be considered together, in order to ascertain what is its meaning. Now, when we come to look at the last clause of this will, we see that when the youngest child becomes of age, the property, both real and personal, is to be divided amongst the testator's children, share and share alike. It is *the property*, both real and personal, which is to be thus divided,—that is, the property before mentioned and devised. As this farm devised was all the real property the testator had at the making of the will and his death, as the demurrer admits, it was this farm,—the real property he had been speaking of and had devised to his wife and five youngest children,—which, no doubt, the testator had in mind when he said, the property, both real and personal, should be divided amongst his children. And he said it should be divided amongst his children,—not amongst his five youngest children.

Appellees' construction disregards this third clause, and denies to it any force and effect, but the will is to be so construed, if possible, as to allow effect to every part. It is the intention of the testator derived from the whole will which must govern. Reading, then, these three clauses of the will together, we find that it was the intention of the testator that this farm which he devised should be divided among all his children, share and share alike, when the youngest child came of age; that the devise of the farm to the widow and five youngest children mentioned in the first clause was not a devise to them absolutely, but a qualified devise to them until the youngest child should come of age; that there was

the same limitation of the devise of the real estate that there was of the personal estate; that in the second clause, "all the rest, residue and remainder of my personal estate also to my beloved wife and the five above named heirs,—that is to say, to my wife during her natural life, and to the minor heirs until they become of lawful age to account for themselves,"—the limitation therein following the words "that is to say," is not confined to the personal property, as would seem the more natural construction from the reading of this clause alone, but that it applies to the real estate as well as to the personal property. Such we believe to be the true construction in view of the last clause,—the one which effectuates the intention of the testator as there manifested,—and which the application of the well known rules of construction requires to be made. It is necessary in order to give effect to the last clause, and it gives effect to all the clauses of the will.

In *Rountree* v. *Talbot*, 89 Ill. 249, this court said: "The great and leading principle in the construction of wills is, that the intention of the testator, if not inconsistent with the rules of law, shall govern, and this intention is to be ascertained from the whole will taken together. Courts will, if possible, adopt such construction as will uphold all the provisions of the will." So in *Brownfield* v. *Wilson*, 78 Ill. 467, it was said: "It is one of the familiar rules of construction, whether of a will or other instrument, that in cases of doubt all its parts should be considered together, and, if possible, to give every clause and provision effect according to the intention of the maker. When ascertained, the intention of the testator must be enforced." And further: "The question, however, is, the entire instrument considered, what did the testator intend by the will?" And see *City of Peoria* v. *Darst*, 101 Ill. 609.

We find that by this will he intended this farm should be divided amongst all his children, share and share alike, when the youngest of them came of age.

Syllabus.

In case of this being found to be the true construction of the will, the question is suggested whether any division of the property can now be had. This question is raised upon the showing of the bill that one of the five younger children has deceased, leaving an only child and heir, which is still a minor, and by the terms of the will the property is to be divided "at the time of the youngest *heir* becoming of lawful age." We have no doubt that by the term "heir" the testator meant child, and as the bill avers the youngest child had become of lawful age, we see no obstacle in the way of a present partition.

The decree of the circuit court is reversed, and the cause remanded for further proceedings in conformity with this opinion.

Decree reversed.

JOSEPH O. FARRELL

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Ottawa May 12, 1882.

1. EVIDENCE *in criminal cases—admission of defendant's affidavit for a continuance on defence of insanity.* On a trial for an assault with intent to murder, when insanity alone is relied on in defence, the assault and shooting not being controverted, it is error to admit in evidence, on behalf of the prosecution, the affidavit of the defendant made for a continuance, in which he denies the act alleged, and his guilt, it being wholly irrelevant to the issue of insanity.

2. SAME—*defendant's affidavit for continuance as evidence.* An affidavit of a party for a continuance is competent evidence against him on the trial, when it is relevant to the issue, it standing on the same footing as any other declaration made by him under oath.

3. SAME—*evidence showing a different offence, not proper.* On the trial of one for an assault with intent to murder, he can not be punished for perjury in his affidavit for a continuance, and the admission of the affidavit in evidence for that purpose, or where its only effect is to show his perjury, is error.

WRIT OF ERROR to the Circuit Court of Whiteside county; the Hon. WILLIAM BROWN, Judge, presiding.

Mr. O. F. WOODRUFF, for the plaintiff in error, reviewing the evidence somewhat in detail, contended that it showed insanity in the accused, and an entire want of motive for the act of the prisoner.

If the evidence all considered shows a want of some essential element to the crime charged, or if the preponderance is such as to leave the judicial mind in serious doubt as to the guilt of the accused, a new trial should be granted. *Rafferty* v. *People*, 72 Ill. 42; *Doiur* v. *State*, 2 Humph. 442.

Homicide may be murder, or manslaughter, or excusable, or justifiable, according to the circumstances of the case or the state of mind inducing the act. Therefore, it is not the naked act which constitutes the offence or determines its character, but the *quo animo*,—the disposition or state of mind with which it is done. *Maher* v. *People*, 10 Mich. 213; *People* v. *Pond*, 8 id. 150; *Wilson* v. *People*, 24 id. 410; 2 Bishop on Crim. Law, sec. 724.

The court committed a grave error in admitting in evidence the prisoner's affidavit for a continuance. It proved no issue in the case, and was well calculated to prejudice the jury against the prisoner. *Yundt* v. *Hartranft*, 41 Ill. 9.

Under the evidence of insanity, it was error to instruct the jury that the law presumed malice from certain acts. If the evidence left the question of malice or criminal intent doubtful, it was not proper to resort to presumptions to solve the obscurity. *State* v. *Coleman*, 2 Rich. 185; *Filkin* v. *State*, 69 N. Y. 101; *State* v. *Painter*, 67 Mo. 84; *Maher* v. *People*, 10 Mich. 213; Wharton on Crim. Evidence, secs. 734–738.

Mr. JAMES MCCARTNEY, Attorney General, for the People, contended that the evidence was amply sufficient to justify the conviction,—that when the act itself is unlawful, a criminal intent will be implied without express proof. *Hanrahan*

v. *People*, 91 Ill. 142; *Perry* v. *People*, 14 id. 496; *Olive* v. *Commonwealth*, 5 Bush, 376; *Roberts* v. *People*, 19 Mich. 401; *State* v. *Goodenow*, 65 Maine, 30; *Mullins* v. *State*, 37 Texas, 337.

The affidavit for a continuance was properly admitted as tending to rebut the evidence of defendant's insanity. The case of *Yundt* v. *Hartranft*, 41 Ill. 9, is not in point. The affidavit in that case was for a change of venue, and could throw no light on the issues. As to the weight of this evidence on the issue of insanity, it was for the jury to decide.

That the instructions that the law presumes a man to intend the reasonable and natural consequences of any act intentionally done, is correct, counsel referred to *Perry* v. *People*, 14 Ill. 496; *Hanrahan* v. *People*, 91 id. 142; *People* v. *Scott*, 6 Mich. 287; *Rumsey* v. *People*, 19 N. Y. 41; *People* v. *Vinegar*, 2 Park. Cr. Rep. 24; *King* v. *State*, 21 Ga. 220; *Cole* v. *State*, 10 Ark. 318.

Mr. WALTER STAGER, State's Attorney of Whiteside county, also for the People.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Plaintiff in error was convicted of an assault with intent to commit murder, and sentenced to the penitentiary for the term of five years. The fact that he committed an assault with a deadly weapon, and without any legal excuse, is proved beyond doubt, and is not controverted. The sole defence interposed upon the trial was, that plaintiff in error was insane at the time of the committing of the assault. Evidence was introduced on behalf of plaintiff in error, and of the People, upon this issue, so that the question was fairly before the jury. Of the weight of that evidence we do not deem it our province, in the present state of the case, to speak. Plaintiff in error was entitled to have the issue passed upon by the jury, and that they might do so intelli-

gently and dispassionately, it was indispensable that irrelevant evidence tending to complicate the issue or improperly arouse their prejudices should be excluded.

Before the trial, plaintiff in error moved to continue the cause on account of the absence of a material witness, and in his affidavit in support of that motion he deposed that he could prove by the absent witness that he did not fire the shot which constituted the alleged murderous assault, and that what he could so prove was true, and that he was not guilty, etc. The court overruled the motion, and refused to continue the cause. On the trial, and after the People had given to the jury all their evidence in rebuttal of the evidence of the plaintiff in error on the question of insanity, the State's attorney was permitted by the court, over the objection of the plaintiff in error, to read this affidavit in evidence to the jury. It is patent that it was utterly irrelevant to the issue being tried. It did not tend to prove a single fact which it was incumbent on the People to prove, or to disprove anything which the plaintiff in error had attempted to prove. Of course, the affidavit of the party is competent evidence against himself, when it is relevant to the issue. It stands on the same footing as any other declaration made by him under oath. But who would pretend that it would be relevant on the question of insanity to prove that a party had, before that time, declared his innocence of any participation in the act alleged to be criminal, and had sworn to this declaration? The affidavit may be true, and the plaintiff in error may have also been insane. If he was in fact insane, he may have had no recollection of the transaction, or no capacity to reason in regard to it. In any view, what he swore to in this affidavit can not have a tendency to enlighten the question whether he was affected with insanity at the time he committed the assault. The improper effect of the affidavit upon the minds of the jury may have been either in producing the belief that the defence of insanity was an

afterthought, and so not urged in good faith, or that plaintiff in error had committed perjury in making the affidavit, for which he deserved punishment. If he was really insane when he committed the assault, it could legally make no difference when the defence was first interposed. He would not, himself, be a competent judge of his mental *status*, and the more certain his insanity, the more certain it would be that his affidavit ought not to be regarded, for any purpose. But the proof that he committed the assault being conclusive, the jury, without reflecting whether sane or insane, might conclude he is clearly guilty of perjury, and use the fact of that guilt not only as a make-weight in determining his guilt of the specific offence charged, but also in fixing the amount of his punishment for that offence. If it be true that he committed perjury in the affidavit, he can not be punished for that offence on this trial. These principles are obvious, and can require no elaboration.

For the error in admitting the affidavit in evidence, the judgment below is reversed, and the cause remanded. The other errors assigned are not deemed tenable.

Judgment reversed.

THOMAS COLLINS

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Ottawa May 12, 1882.

1. NEW TRIAL—*upon the evidence—in a criminal case.* In a criminal case, it is only when this court is able to say, from the insufficiency or unsatisfactory character of the evidence, there is clearly a reasonable and grave doubt of the guilt of the accused, that it will be justified in setting aside a conviction on the ground it is not supported by the evidence.

2. SAME—*on newly discovered evidence.* Newly discovered evidence which is merely cumulative and impeaching in its character, does not afford

ground for a new trial, except under special circumstances; and where it is not shown to the contrary, it will be assumed that the facts proposed to be proven by the alleged newly discovered witnesses were known to the party making the application, before the trial.

3. JUROR—*whether objection availing on error when peremptory challenges are not exhausted.* In a criminal case, where the defendant was on trial upon a charge of robbery, a juror was challenged for cause, the ground of objection being that he could not understand the English language. Upon his examination the juror stated that he was a German; could read and speak English, but could not read writing in English. The challenge was disallowed in the court below, and the juror was sworn, and served as a juror in the case. On error it was *held*, without inquiring whether the juror was incompetent on the ground suggested, that inasmuch as it did not appear that the accused had exhausted his peremptory challenges, or that he subsequently had occasion to do so, the objection was not well taken.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

Messrs. E. & A. VAN BUREN, for the plaintiff in error.

Mr. LUTHER LAFLIN MILLS, State's Attorney, for the People.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

At the September term, 1881, of the Criminal Court of Cook county, Thomas Collins, John Grady and Burt Murphy were indicted for the robbery of Patrick Doyle. In November following they were tried before the court and a jury, and convicted, the jury fixing their punishment at confinement in the penitentiary at four years. A motion for a new trial having been overruled, they were severally sentenced by the court in pursuance of the verdict. To reverse this conviction as to Collins, the present writ of error is prosecuted.

That Doyle was robbed some time after 12 o'clock on the night of the 15th of September, 1881, is not questioned. Doyle is positive in his identification of the defendants as the perpetrators of the offence, and his testimony on this point is uncontradicted by any one except Collins, and Doyle's statements in most all other respects are fully corroborated by the other witnesses.

It appears that some time between 11 and 12 o'clock of the night of the robbery, the parties met at Murray's saloon, 265 South Clark street, and remained there until 12 o'clock, when, by order of the proprietor, they went out of doors, and the saloon was closed. While there Doyle was engaged in throwing dice for money, and drinking pretty freely. The evidence tends to show that both Doyle and Collins were drunk, yet, notwithstanding this, it is clear they were able to leave the saloon together, and the fact that Doyle gives so correct an account, as corroborated by all the witnesses present, of what transpired while he was in the saloon, and of how he occupied his time while there, affords conclusive evidence that he was not so drunk but that he fully understood what was going on, and we therefore do not attach so much importance to the evidence tending to show he was drunk, as counsel. His account of the affair is altogether reasonable, and it was for the jury to say whether it was true or not, and in view of the fact he is so strongly corroborated in other particulars, and that he is contradicted only by Collins as to the principal fact, we would not be justified in reversing the conviction on the ground the evidence does not sustain it. It is only when this court is able to say, from the insufficiency or unsatisfactory character of the evidence, there is clearly a reasonable and grave doubt of the guilt of the accused, that it will be justified in setting aside a conviction on this ground. Such we do not think is the case here. The objection, therefore, that the case should be reversed on the evidence, can not prevail.

It only remains to determine what, if any, errors of law were committed by the trial court which may have improperly influenced the jury, or otherwise contributed to the conviction of the accused.

It appears that in the selection of the jury a juror was challenged by the accused, on the ground he did not understand the English language. The juror stated on his exam-

ination that he was a German; could speak and read English, but could not read writing in English. The challenge was disallowed, and thereupon the juror was sworn, and served as a juror in the case, and this is assigned for error. Without stopping to inquire whether the juror was incompetent on the ground suggested, it is sufficient to say that it does not appear that the accused had exhausted his peremptory challenges, or that he subsequently had occasion to use all his peremptory challenges, and such being the case, under the authority of *St. Louis and Southeastern R. R. Co.* v. *Lux,* 63 Ill. 525, the objection is not well taken.

Various objections are made to the giving, refusing and modification of certain instructions. We perceive no error in the refusing of any instruction. While some of those given may not have been technically correct when considered separately, yet when all the instructions given, both for the People and the accused, are considered as a whole, we think they fairly presented the law of the case to the jury, and this is all the law requires.

It is further objected the court erred in refusing to grant a new trial on the ground of newly discovered testimony. We do not think so. It appears from the affidavits of Moyneham and Hopman, two of the newly discovered witnesses, that their testimony on a second trial would be merely cumulative and impeaching in its character, and it is well settled that such evidence does not warrant a new trial except under special circumstances, which do not appear here. As to the facts proposed to be proven by Watson, it appears from his affidavit they were acquired by him under such circumstances as to render him unworthy of belief. At the time of taking the affidavit he was confined, himself, in jail on a charge of robbery, and the facts proposed to be proven by him are, that he was present at the time of the robbery, and that it was committed by others than the accused. If convictions are to be set aside for testimony of this character,

Syllabus.

coming from such quarters in great cities like Chicago, where crime is organized and robberies are of nightly occurrence, courts and law-abiding people may well despair of bringing such offenders to justice. But outside of this, for aught that appears, the facts proposed to be shown by Watson were known to the accused before the present trial, and we must assume that such is the fact, otherwise the contrary would have been shown—and this, by all the authorities, affords a conclusive reason why a new trial should not be granted, so far as his testimony is concerned.

Believing the conviction is warranted by the evidence, and perceiving no substantial error of law in the record, the judgment of the court below will be affirmed.

Judgment affirmed.

LEANDER DOUGLASS

v.

JOSEPH MARTIN *et al.*

Filed at Ottawa May 12, 1882.

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64a 243

103 25
102a 1500

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210 1158
e112a 1280

1. CHANCERY JURISDICTION—*when there is a complete remedy at law.* The general rule, subject to a few exceptions, is, that a court of chancery is prohibited from entertaining jurisdiction in all cases when the plaintiff has a complete and adequate remedy at law. When the court of law has jurisdiction, the complainant must show that his case falls within the exception, to entitle him to relief in equity.

2. SAME—*under the head of trust.* Where a friend of one under indictment places money in the hands of another, under a contract that if an attorney shall procure the acquittal of the accused, or his discharge from arrest, by *habeas corpus* or otherwise, the depositary is to pay the amount thereof to the attorney, otherwise to return the same to the person depositing it, there is no such a trust created as to entitle the attorney to sue for and recover the sum promised him, in a court of equity, the remedy being adequate at law.

3. TRUST—*to give a court of equity jurisdiction.* The mere delivery of property or money to one to be held by him until the performance of an act by

another, when it is to be paid over to such other person, otherwise returned, does not, independent of other equitable circumstances, necessarily create a trust. It must either vest an equitable title in or create a lien in favor of the beneficiary, and this must be by agreement of the parties, or under such circumstances as equity will declare a lien exists.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on writ of error to the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

Mr. L. DOUGLASS, *pro se:*

A court of equity has jurisdiction to declare and enforce trusts. *Harris* v. *Douglass*, 64 Ill. 466; *Hopkins* v. *Granger*, 52 id. 504; *Attorney General* v. *Illinois Agricultural Coll.* 85 id. 516; *Coates* v. *Woodworth*, 13 id. 659; 2 Story's Equity Jur. 60; *Doyle et al.* v. *Murphy et ux.* 22 Ill. 509; *Steele et al.* v. *Clark*, 77 id. 474; *Marlow* v. *Marlow*, 77 id. 633.

A trustee may be defined to be a person in whom some estate, interest or power in or affecting property of any description, is vested for the benefit of another. Hill on Trustees, 65.

All the conditions to the relation of a trustee concur in this case. *Matteson* v. *Kellogg et al.* 15 Ill. 547; 2 Story's Equity Jur. 295, sec. 964.

Mr. A. B. JENKS, for the defendants in error:

A court of equity will not declare a trust where there is a remedy at law. Story's Equity Pl. sec. 473; *Doyle* v. *Murphy*, 22 Ill. 502.

A trust is where there is such a confidence between parties that no action at law will lie, but is merely a case for the consideration of a court of equity. *Sturt* v. *Mellish*, 2 Atk. 612; 2 Story's Equity Jur. sec. 964.

There is adequate remedy at law, and if merely calling this a trust gives a court of chancery jurisdiction, then in every case of a promise the court would have jurisdiction if

complainant called it a trust. Our law does not recognize equitable attachments. *Bigelow et al.* v. *Andress*, 31 Ill. 323.

Equity can only recognize and enforce a lien which is created by the acts of the parties. *Davey et al.* v. *Eckert*, 62 Ill. 218.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a bill in equity, filed by plaintiff in error, in the Superior Court of Cook county, against defendants in error, for relief on this agreement:

"This agreement between M. C. McDonald, Joseph Martin and Leander Douglass, witnesseth:

"That said Douglass is to act as the attorney of Pat. Guerin, now in Knox county jail under indictment for larceny, and also for conspiracy to commit larceny; and said Martin has deposited with said McDonald $1200. Now, if said Douglass succeeds in obtaining the release of said Guerin, on *habeas corpus*, *nolle pros*, or on final trial in the circuit or Supreme Court, then the said McDonald agrees to pay said money to said Douglass; and if, in the end of the litigation, said Guerin shall not be successfully defended or released, or if said Martin shall procure his release before the first Monday of October next without the services of said Douglass, then the money to be paid to said Martin."

It was dated the 23d of July, 1880, and was signed by Martin, Douglass and McDonald.

The bill alleges that Douglass entered upon the defence, as required by the agreement; that the indictment against Guerin for conspiracy to commit larceny was by complainant procured to be dismissed; that he rendered other valuable services in the defence of Guerin; that he and Martin conspired to cheat complainant out of his fee, and in pursuance thereof Guerin plead guilty to the indictment for larceny, and was sentenced thereunder to a term in the penitentiary,

thereby rendering it impossible for complainant to perform his contract by procuring his acquittal before a jury. He alleges he was ready, able and willing to perform his part of the contract, and to try the case before a jury. It is alleged in the bill that the amount mentioned in the contract as having been deposited by Martin with McDonald was a certificate of deposit in a Chicago bank, and was assigned by Martin to McDonald as a fund with which to pay complainant for his legal services in the case, and it is alleged that this thereby became a trust fund in favor of complainant. To this bill a demurrer was filed, which was sustained by the court, and the bill was dismissed. The case was removed to the Appellate Court for the First District, where, on a hearing, the decree was affirmed, and complainant brings the case to this court on error, and urges a reversal. He assigns for error that it was error in the Appellate Court to affirm the decree of the lower court, and that it should have been reversed.

The question of the jurisdiction of a court of equity lies at the threshold of this case. It is urged, in support of the decree, that there is a complete remedy at law, and that a court of equity has no power to afford relief even if plaintiff in error has grounds of recovery. As long as the difference is recognized between the jurisdiction of the two forums, each must be confined to its own, and it is the province of the legislature, and not the judicial department, to abolish the distinction. It is a rule that has never been questioned, that where the two courts prevail, a court of chancery is prohibited from entertaining jurisdiction in all cases where the plaintiff has a complete and adequate remedy at law. The rule is, however, subject to the limitation that in a small number of cases the jurisdiction is concurrent, and in others the General Assembly has conferred on the court of chancery a concurrent jurisdiction. But they do not form the rule, but are exceptions to it. And where a court of law has juris-

diction, complainant must show that his case falls within the exception, before he can obtain relief in equity. These propositions are plain, and familiar to the entire profession; but while they are fully recognized, difficulty may and does arise as to their application in some cases.

It can not be successfully contested that an action at law would lie on this agreement, nor is it perceived why it would not be as adequate and fully as complete, as a remedy, as by a bill in chancery. If a recovery was thus obtained, it would be against the same parties that a decree would be rendered, and the fruits of the judgment as certain and effectual. In an action at law, if a breach of the agreement was averred and proven, a judgment would follow, with an assessment of the amount of damages proven.

But it is claimed that the court should take jurisdiction under its equitable head of administering a trust,—that when Martin placed the money in McDonald's hands it became a trust fund, to be held by him for plaintiff in error. We fail to see on what principle, or under what rule, it can be a trust. When a person loans another a sum of money, or sells him property on time, there is, in one sense, a trust, but not in the equitable sense. Complainant did not look to that fund for payment, but he took McDonald's contract to pay it on the performance of the agreement by plaintiff in error. McDonald did not agree to pay plaintiff in error from that specific fund, but the promise was general. The agreement does not show, nor is it alleged, that the money was placed in McDonald's hands as a stakeholder; but if it did appear, that would not confer jurisdiction on a court of equity. The books abound with cases of suits against stakeholders, and no case has come to our attention where a suit in chancery was maintained in such a case. We are clearly of opinion that the remedy was at law, and not in equity.

Plaintiff in error refers to the case of *Steele* v. *Clark*, 77 Ill. 471, as controlling this case. We regard this as a misappre-

hension. It is true that the rule is there broadly stated that where property is conveyed or given by one person to another for the use of a third person, such a trust as is recognized and administered by equity will be created. That was not said with a view to defining the rule with precision. The mere delivery of property or money to be thus held, independent of all other circumstances, does not necessarily create such a trust. Other and equitable considerations must exist to produce that effect. It must either vest an equitable title in, or create a lien in favor of, the beneficiary, and this must be by agreement of the parties, or under such circumstances as equity will declare a lien exists. There is nothing to show such title or lien in this case.

Perceiving no error in this record, the decree of the Appellate Court is affirmed.

Decree affirmed.

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PHILLIP COLE *et al.*

v.

JOHN HALL, Collector.

Filed at Ottawa May 12, 1882.

1. TAXATION—*license fee on dogs—not a tax.* The license fee imposed on the owners of dogs, under the act of 1879, entitled "An act to indemnify the owners of sheep in cases of damage committed by dogs," is in no sense a tax, and is therefore not within the constitutional provision that all needful revenue shall be raised by levying a tax by valuation. Such fee is imposed under the police power, and not under the taxing power of the State.

2. POLICE POWER OF THE STATE—*imposing license fee upon dogs.* Everything hurtful to the public interest is subject to the police power of the State, and may be brought within restraining and prohibiting influence. Therefore the act authorizing a license fee to be imposed upon and collected of the owners or keepers of dogs is not subject to any constitutional objection.

3. STATUTE—*expressing subject in the title—act concerning dogs.* The matter of imposing a license fee upon the owners or keepers of dogs is suf-

ficiently expressed in the title of the act entitled "An act to indemnify the owners of sheep in cases of damage committed by dogs."

WRIT OF ERROR to the Circuit Court of La Salle county; the Hon. FRANCIS GOODSPEED, Judge, presiding.

Mr. J. B. RICE, and Mr. GEO. W. W. BLAKE, for the plaintiffs in error.

Mr. L. W. BREWER, for the defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The bill in this case was brought by owners of dogs, resident in the town of Serena, against the collector of taxes for the town, and is to enjoin the collection of a "license fee" of one dollar on each dog owned by complainants, respectively, and which was imposed by the proper authorities under the act of May 29, 1879, entitled "An act to indemnify the owners of sheep in cases of damage committed by dogs." It is not questioned the statute has been complied with by the proper authorities in charging the "license fee" upon complainants for dogs owned by them, but the questions argued have exclusive reference to the constitutionality of the act under which it is sought to be imposed.

The "license fee" imposed under the provisions of the statute is in no sense a tax, and is not therefore within the operation of section 1, art. 9, of the constitution, which provides all needful revenue shall be raised by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to his, her or its property, and hence all questions as to the value of property to be taxed are of no consequence in this case. It is simply what it purports to be, a "license fee," and is imposed under the police power, and not under the taxing power of the State. Undoubtedly "dogs" are regarded as a species of property for some purposes, but owing to their habits, which are known to be hurt-

ful sometimes to persons and to some kinds of domestic animals, the keeping of them may be the subject of regulations provided by law. Everything hurtful to the public interest is subject to the police power of the State, and may be brought within its restraining or prohibitory influence, otherwise a public evil might exist, with no power to abate it. This ought not to be. It is known that "dogs" often impart a most fearful disease to persons injured by them, and that they are oftentimes destructive to domestic animals, such as sheep, and the State may well provide such regulations for the keeping of them as will insure safety, and may, with a view to effectuate that purpose, impose upon the owners or keepers either a license or a penalty. There is nothing in the constitution that forbids it.

As to the objection the matter of imposing a "license fee" upon the owners or keepers of dogs is not expressed in the title of the act, a majority of the court are of opinion it is sufficiently germane to the subject expressed as to be fairly embraced in it, and that, under the decision of this court in *Johnson* v. *The People*, 83 Ill. 431, answers the constitutional requirement in this regard.

It would seem it can make no difference what disposition is made of the "license fee" when collected. By the provisions of the act it is appropriated as indemnity to persons that have sustained damage done by dogs, other than their own, to sheep, and that would appear to be in the interest of justice and right. No better disposition could be made of it.

The demurrer to the bill was properly sustained, and the decree of the circuit court will be affirmed.

Decree affirmed.

Syllabus. Statement of the case.

THE WEST CHICAGO PARK COMMISSIONERS

v.

THE WESTERN UNION TELEGRAPH COMPANY *et al.*

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Filed at Ottawa May 12, 1882.

1. PARK COMMISSIONERS—*power to locate boulevards to connect with other parks.* Under section 12 of the act of 1869, in regard to the completion, improvement and management of public parks, etc., the West Chicago Park Commissioners have the power to condemn land for a boulevard within their district, to connect the park and boulevard under their control with those under the control of the South Park Commissioners. This section relates to a new and entirely different subject matter, not provided for in the original act relating to the West Chicago Park.

2. SAME—*two sets of commissioners not required to join in proceeding to condemn.* Section 12 of the act of 1869 is general, and has no specific reference to any particular park commissioners, and is limited only to the effect that the parks whereof they are commissioners shall have been established in two or more towns contiguous to each other. It does not require that two sets of commissioners shall constitute a new and single board for the purpose of connecting their several parks. Each set of commissioners simply acts within its own district. If the parks sought to be connected lie in separate districts, it may require coöperative action to complete the connection. But in such case the jurisdiction of each of the commissioners must terminate with the boundary of their respective districts.

3. SAME—*are "corporate authorities."* The West Chicago Park Commissioners are a *quasi* municipal corporation, capable of being invested by the legislature with power to assess and collect taxes within the district, and have the power to condemn land for the purpose of making a boulevard or pleasure way connecting two or more parks already established by law.

APPEAL from the County Court of Cook county; the Hon. MASON B. LOOMIS, Judge, presiding.

This was a condemnation proceeding begun by the West Chicago Park Commissioners under an ordinance passed by them on May 2, 1881, and providing as follows:

1. That a boulevard running from the south end of Douglas Park to the Illinois and Michigan Canal, be located and established, as shown by an accompanying map.

2. That said improvement shall be made and the cost thereof paid by special assessment, to be levied on the property to be benefited thereby.

3. That the attorney of the board shall file a petition in the name of the board in the county court to condemn the necessary lands.

The county court sustained a demurrer to the petition, and dismissed the petition, to reverse which judgment this appeal is prosecuted.

Mr. GEO. W. SMITH, for the appellant:

The special acts of 1869 create this board, and section 12 of the act of 1873 gives the commissioners the right to acquire land by condemnation, for the purpose of connecting the park with any other of a contiguous district. This is an express grant of a franchise. *Chicago and Western Indiana R. R. Co.* v. *Dunbar*, 95 Ill. 571. See, also, *Kreigh* v. *City*, 86 id. 407; *People* v. *Walsh*, 96 id. 232.

It is urged that the commissioners are not corporate authorities. This has been settled otherwise. *Andrews* v. *People*, 83 Ill. 530; *Andrews* v. *People*, 84 id. 28; *Wilcox* v. *People*, 90 id. 192; *People* v. *Walsh*, 96 id. 232; *Kreigh* v. *City*, 86 id. 407; *Atchison* v. *People*, 95 id. 452.

Because they do not levy the general tax, and because a specific method for the improvement of a boulevard, or laying a sewer, is pointed out, furnish no reason for overturning or reversing a plain and express grant of power to select and appropriate lands. Even this limitation, so far as concerns the improvement of streets taken for boulevards, has since been modified by the act of 1879, concerning drives to public parks. Rev. Stat. chap. 105, sec. 49; Laws of 1879, p. 216; *People* v. *Walsh, supra.*

Mr. EUGENE E. PRUSSING, for the appellees Schuttler and Holtz, contended that the act of 1873, of which section 12 is a part, confers the power to levy the assessments authorized

therein, upon the town supervisor, clerk and assessor, and designates and constitutes them, and not the park commissioners, the corporate authorities of said town. There can not be two sets of corporate authorities having this power in the same town. *Updike* v. *Wright*, 81 Ill. 46.

While it may be true that this court held in *Andrews* v. *People*, 83 Ill. 529, that the West Park Commissioners were corporate authorities for park purposes under the act of 1869, it is clear that for any purpose provided for in the act of 1873 they are not the corporate authorities. See sec. 4 of the act of 1873.

MESSRS. LEAMING & THOMPSON, for the appellee Geo. W. Lay:

The express limitation contained in the special act of 1869 creating the West Park Commissioners, declaring that the part of the boulevards south of the Chicago, Burlington and Quincy railroad track shall not be made unless the land therefor shall be acquired free of cost, is not repealed by section 12 of the general act of 1873. Repeal by implication is repugnant to the established rule for the construction of statutes. *Town of Ottawa* v. *County of LaSalle*, 12 Ill. 339, and cases cited; *City of East St. Louis* v. *Maxwell*, 99 id. 439; *Wragg et al.* v. *Penn Township*, 94 id. 11; *Gunnarssohn* v. *City of Sterling*, 92 id. 569; *Covington* v. *City of East St. Louis*, 78 id. 548; Dillon on Mun. Corp. sec. 54.

The West Chicago Park Commissioners are not included in the class of park commissioners to which section 12 of the act of 1873 refers, and said section does not apply to or confer any power upon said West Chicago Park Commissioners. The improvement contemplated is a local improvement to be made by special assessment, and as such can only be made by the corporate authorities of cities, towns and villages. The act in question expressly designates the town supervisor, clerk and assessor the corporate authorities of

such town to levy the tax or any assessments in said act authorized. Sec. 12, act of 1873, (Rev. Stat. sec. 38, chap. 105); Constitution of 1870, sec. 9, art 9; sec. 4, act of 1873, (Rev. Stat. chap. 105, sec. 30); *Updike* v. *Wright*, 81 Ill. 49.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

By the fifth section of the "Act to amend the charter of the city of Chicago, to create a board of park commissioners, and authorize a tax in the town of West Chicago, and for other purposes," approved February 27, 1869, (Private Laws of 1869, vol. 1, p. 345,) it is, among other things, enacted that the West Chicago Park Commissioners "shall have power, and it is made their duty, to acquire the lands required for a road or pleasure way, or boulevard, not less than two hundred and fifty (250) feet, beginning at a point north of Fullerton avenue, and at or near the north branch of the Chicago river, and extending west, to a point one mile or more west of Western avenue, and thence southerly to a point at or near the Illinois and Michigan Canal; also for three parks, upon the line of said boulevard, and upon the part of the same between the two last mentioned points, of not less than one hundred (100) nor more than two hundred (200) acres each, the first to be located north of Division street, the second to be located between Kinzie street and Harrison street, and the third to be located between Harrison street and the Chicago, Burlington and Quincy Railroad track," etc. By the concluding part of the section it is enacted, "the part of said boulevards * * * south of the said Chicago, Burlington and Quincy railroad track shall not be made unless the land therefor shall be acquired free of cost to said board, and shall not be ornamented or improved until after the improvement of the parks shall have been completed, unless the same be done by voluntary contributions."

The condemnation sought is for a boulevard to connect the boulevard and parks under the control of the West Chicago

Park Commissioners with those under the control of the South Park Commissioners, the greater portion of which will lie "south of the said Chicago, Burlington and Quincy railroad track," and is therefore within this prohibition, if it be applicable to such an improvement. This is admitted by appellant's counsel, but he claims the condemnation is authorized by the twelfth section of the "Act in regard to the completion, improvement and management of public parks and boulevards, and to provide a more efficient remedy for the collection of delinquent assessments," (Rev. Stat. 1874, p. 747,) which is as follows:

"Sec. 12. *Be it further enacted*, That in cases where, by virtue of any act or acts heretofore passed, public parks or boulevards have been designated or established in two or more towns contiguous to each other, and where the commissioners authorized by such act or acts to locate such parks or boulevards shall desire to connect the same by a boulevard or pleasure way, so as to form a continuous improvement, or shall desire to connect such park with other portions of the park district in which such park is located, by a boulevard or pleasure way, it shall and may be lawful for such commissioners to select and designate the line of such boulevard or pleasure way, and to acquire title to the lands which may be necessary to make such connection, by purchase or otherwise; and in case such commissioners can not agree with the owner or owners, lessee or occupant of any of the real estate so selected, they may proceed to procure the condemnation of the same in such manner as is now or may be prescribed by any general law for the condemnation of lands for public use, and the cost and expense of acquiring title to such land shall be levied upon and collected by special assessment upon the property deemed specially benefited by the location of such boulevard or pleasure way, in the same manner as the cost of other lands for parks and boulevards is assessed under the several acts creating such boards; and

such boulevards or pleasure way shall be under the control and management of such park commissioners, the same as other public grounds by them established."

Counsel for appellees contend this section does not repeal the prohibition in the fifth section of the act of 1869. In this we entirely agree with them, but we do not agree with the conclusion sought to be drawn therefrom. The fifth section of the act of 1869 has reference exclusively to the acquiring of lands "for a road or pleasure way, or boulevard," and "for three parks, upon the line of said boulevard," within a certain prescribed district, over which is given jurisdiction to the "West Chicago Park Commissioners," for park purposes, whereas this section relates to a new and entirely different subject matter not provided for by that section, nor directly affected by it, namely, to cases "where, by virtue of any act or acts theretofore passed, public boulevards have been designated or established in two or more towns contiguous to each other, and where the commissioners authorized by such act or acts to locate such parks or boulevards shall desire to connect the same by a boulevard or pleasure way, so as to form a continuous improvement, or shall desire to connect such park with other portions of the park district in which such park is located, by a boulevard or pleasure way."

But counsel for appellees contend this section can have no application to the West Chicago Park Commissioners, because it does not describe them; that its reading, if carefully observed, confines it to the South Park Commissioners alone; that to apply it in any manner to the West Chicago Park Commissioners, it is necessary to construe the language as applying to two different sets of commissioners of parks located, respectively, in towns contiguous to each other, and that if this construction were followed, it necessarily would require that both boards of park commissioners—namely, that of the West Chicago Park and that of the South Park,—

should join in the proposed improvement, and the boulevard or pleasure way thus established would be under the management and control of such park commissioners the same as other "public grounds by them established," which is absurd. The language of the section seems to afford a complete answer to this position. The act professes to be general, and makes no specific reference to the South Park Commissioners. The language is as comprehensive as could have been used to indicate that it applies to all cases where it is desired by the commissioners to connect public parks established in two or more towns contiguous to each other. "Where * * * public parks * * * have been established in two or more contiguous towns to each other," and "where the commissioners authorized to locate such parks," not the commissioners of a particular park or park district, but generally, limited only by the previous language, to the effect that the public parks whereof they are commissioners, shall "have been established in two or more towns contiguous to each other," * * * "shall desire to connect the same, * * * it shall and may be lawful," etc. There is nothing here requiring that two sets of commissioners shall constitute a new and single board for this purpose, but additional power is simply vested in each to make a boulevard or pleasure way for a purpose not within the contemplation of the respective original acts under which they were created—each set of commissioners simply acts within its own district. The new boulevard to be created may all lie in one district, connecting with a boulevard already created in another district to the common boundary, or partly in one district and partly in another, and thus require coöperative action to its completion. But in either case the jurisdiction of the commissioners must necessarily terminate with the boundaries of their respective districts.

Again, it is contended by counsel for appellees, the improvement can only be made by the corporate authorities of cities,

towns and villages, and these commissioners are not such authorities, and *Updike* v. *Wright*, 81 Ill. 49, is referred to as sustaining the proposition. This is a misapprehension. The question of who constitute the corporate authorities of a municipality, was not before the court in that case, nor discussed in the opinion. It was conceded those claiming there to act as drainage commissioners were not such authorities. The language quoted by counsel from the opinion has reference to the *corporation*, which is empowered to make local improvements, by special assessments or special taxation, on contiguous property, etc., and not to the *agencies* or *instrumentalities* through which these corporate powers must be exercised.

But in *The People ex rel. Wilson et al.* v. *Salomon*, 51 Ill. 37, it was held, "while section 5 of article 9 of the constitution,—which provides that the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes,—must be construed as a limitation upon the power of the legislature to authorize any other than corporate authorities to assess and collect local taxes, and as limiting the objects of local taxation to corporate purposes, yet it does not confine the legislature to any particular corporate authorities, or to any then known instrumentalities of that character. There is no prohibition against the creation, by the legislature, of every conceivable description of corporate authorities, and when created, to endow them with all the faculties and attributes of preëxisting corporate authorities." And so it was held several towns might be united into one district for park purposes, and in this respect, and for this purpose, the power of assessing or collecting taxes might be vested in commissioners specially created for the purpose. And again, in *Wilcox* v. *The People*, 90 Ill. 186, in speaking of these same West Chicago Park Commissioners, we said: "By the decisions of this court this board of park commis-

sioners is held to be a *quasi* municipal corporation, a 'corporate authority,' in whom it was competent for the legislature to vest the power to assess and collect taxes within the park district created." This is reiterated in *The People ex rel.* v. *Walsh et al.* 96 Ill. 232, and it was there also held it was competent for the General Assembly to place streets of the city of Chicago under the control and management of park commissioners.

We do not at present conceive it our duty to inquire by what means the money to pay the expenses arising from this condemnation shall be raised. The question before us relates only to the right to exercise, or to cause to be exercised, for the purpose here indicated, the power of condemnation.

We have, perhaps, omitted to notice specifically some minor objections, but if so, we deem them only of secondary importance, and necessarily controlled by what has already been said in regard to the objections we have considered.

The judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed.

ASAHEL GAGE

v.

JAMES GRIFFIN.

Filed at Ottawa May 12, 1882.

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1. CHANCERY—*jurisdiction—bill to remove cloud on title.* Since the act of 1869, a bill to quiet title or remove a cloud from the title to land which fails to show that the complainant is in possession, or that the premises are unoccupied and unimproved, is bad on demurrer, as not showing a case of equitable jurisdiction.

2. SAME—*waiver of objection to jurisdiction.* Where a defendant demurs to a bill to set aside a tax deed as a cloud upon title, on the ground it presents no case for the interposition of a court of equity, but declines to

answer, even upon being ruled to answer, he will not be held as having waived his objection that there was a want of jurisdiction, on the ground of there being an adequate remedy at law.

APPEAL from the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

Mr. AUGUSTUS N. GAGE, for the appellant:

A bill to remove a cloud from the title to land can only be maintained when the property is vacant or unoccupied, or is in the possession of the complainant. The bill not showing the condition of the property, the demurrer should have been sustained for want of jurisdiction. *Gage* v. *Abbott*, 99 Ill. 366, and cases there cited.

Again, the bill is defective in failing to offer the plaintiff in error the money he has paid out for the delinquent taxes. A party seeking equity must do equity.

Messrs. MASON BROTHERS, for the appellee:

The bill alleges that the deed is a cloud upon complainant's title, and prevents his enjoyment and disposal of the same. This sufficiently shows that the land is vacant and unoccupied. *Gage* v. *Abbott*, 99 Ill. 366.

It should be remembered the bill was taken for confessed, and that all intendments are to be made in support of the decree.

In this case the defendant did not abide by his demurrer and allow a decree on it, but, on the contrary, ten days were allowed him in which to answer, and then the bill was taken for confessed for want of an answer. That this is a waiver of objection to the jurisdiction, see *Knapp et al.* v. *Marshall et al.* 26 Ill. 63; *Dodge et al.* v. *Wright et al.* 48 id. 383.

No question appears to have been raised in the court below as to the jurisdiction of a court of chancery in this case, and it is too late to raise it for the first time here. *Mix* v. *Ross et al.* 57 Ill. 121; *Stout* v. *Cook*, 41 id. 447.

Objection that there is a remedy at law must be raised and urged in the court below, or it will be considered waived. *Comstock* v. *Henneberry*, 66 Ill. 212; *Hickey* v. *Forrestal*, 49 id. 256.

A decree made by consent can not be appealed from, nor can error be properly assigned upon it. *Armstrong et al.* v. *Cooper et al.* 11 Ill. 540.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a bill brought by James Griffin, against Asahel Gage, in the Superior Court of Cook county, to set aside certain tax deeds held by the defendant to a lot of land of which complainant was alleged to be owner, as being a cloud upon the title of complainant. To the bill a general demurrer was filed, which the court overruled, and ruled the defendant to answer in ten days, and on failure of compliance with the rule the bill was taken as confessed against the defendant, and a decree entered declaring the tax deeds to be void, and enjoining the defendant from asserting any title under them to the premises they purported to convey. The defendant appealed from the decree.

In *Gage* v. *Abbott*, 99 Ill. 366, this court held that since the statute of 1869, (Rev. Stat. 1874, p. 204, sec. 50,) a bill to quiet title, or remove a cloud from the title, which fails to show that the complainant is in possession, or that the premises are unoccupied and unimproved, is bad on demurrer, as not showing a case for equitable relief; and to the like effect is *Hardin* v. *Jones*, 86 Ill. 313. The bill in the present case fails to show either one of the above named facts, and therefore was bad, and the demurrer to it should have been sustained, upon the authority of the above cases.

It is objected that it is too late to make the objection for the first time in this court that there was an adequate remedy at law, and that from the bill being taken for confessed against the defendant there was a waiver on his part of this

objection, and various decisions of this court are cited as supposed to favor such view.

This court held in *Stout* v. *Cook*, 41 Ill. 447, that the objection there was a complete remedy at law came too late after having filed an answer without taking the exception, and in *Dodge* v. *Wright*, 48 Ill. 382, that such objection will be deemed to have been waived by a defendant where, after the proofs have been taken, he consents to a hearing upon the merits. We do not understand, from any general expressions in other cases cited, that the court intended to decide anything differently than in the above cases, and that anything less than there indicated, and that no more than what occurred in the present case, would waive the objection.

In *Stout* v. *Cook*, reference was made to a note in 1 Daniell's Ch. Practice, (5th Am. ed.) 551, where the authorities on this point are collected, and among them being *First. Cong. Society* v. *Trustees*, 23 Pick. 148, that "if a defendant in a suit in equity answer and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has a plain and adequate remedy at law." And see *Grandin* v. *Le Roy*, 2 Paige, 509; *Hawley* v. *Cramer*, 3 Barb. Ch. 574. So in *Underhill* v. *Van Costland*, 2 Johns. Ch. 369, it was said, by answering in chief instead of demurring, the defendants submitted the cause to the cognizance of the court, and they came too late at the hearing on the merits to raise the objection that there was an adequate remedy at law; that it would be an abuse of justice if defendants were permitted to protract a litigation to that extent, and with the expense attending it, and then at the final hearing interpose with this preliminary objection.

In the case before us, the defendant did take objection by demurrer that the bill presented no case for the interposition of a court of equity, and did nothing further. Had he answered without taking the exception that there was an adequate remedy at law, and thus submitted to the jurisdic-

tion of the court, he might be deemed to have waived the objection. Though ruled to answer, defendant did not answer, and having taken no other step in the cause than interposing a demurrer, it does not appear that the defendant submitted himself to the jurisdiction of the court without objection, and we see nothing to amount to a waiver of the objection that there was an adequate remedy at law, or to preclude appellant from now insisting upon the objection.

The decree will be reversed, and the cause remanded for further proceedings consistent with this opinion.

Decree reversed.

THE PEOPLE *ex rel.* JOHNSON, Collector,

v.

FREDERICK M. ATKINSON.

103 45
153 519

Filed at Ottawa May 12, 1882.

1. TAXATION—*assessment in the wrong town—in pursuance of incorrect return by owner of property.* Where a person makes out and delivers to the assessor of the town in which he keeps his business office, a schedule of the amount, quantity and quality of all his personal property required to be listed for taxation, he will be bound by such return, though a portion of the property is required to be returned by him to the assessor of a different town, where it is also assessed.

2. INJUNCTION—*to restrain collection of taxes on an assessment in wrong town.* Where a person voluntarily makes a return of his personal property to an assessor of a town other than that of the *situs* of the property, and which is subject to assessment in a different town, a court of equity will not enjoin the collection of the taxes extended upon such erroneous assessment on the ground that the party was induced to make such return in ignorance of the law, upon the statement of the assessor to him at the time that the taxes would be the same if the property was assessed in either town. Such statement can not render the assessment fraudulent, as the party is bound to know the law.

APPEAL from the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

Mr. CONSIDER H. WILLETT, for the appellant:

Parties making returns of personal property under oath to assessors, are bound by such returns, and can not allege fraud or mistake in their execution. See Rev. Stat. secs. 5, 6, 7, 13, 24 and 25, of chap. 120.

The law presumes that the appellee knew the meaning of the statutes to the same extent that the assessor could understand them. The allegation that the assessor stated that the taxes in the town of Proviso or in the town of South Chicago would be the same upon the same return, was but a conclusion of law equally known to either party, and hence can not be urged to establish fraud.

An overvaluation of property is no ground to enjoin the collection of taxes. *Gage* v. *Evans*, 90 Ill. 569; *Union Trust Co.* v. *Weber*, 96 id. 346.

The power to assess property for taxation is vested in the assessors, and the courts have no power to revise their assessments. *Republic Life Ins. Co.* v. *Pollack*, 75 Ill. 294; *People* v. *Brislin*, 80 id. 423; *Porter* v. *Railroad Co.* 66 id. 594; *Spencer* v. *People*, 68 id. 510; *Ottawa Glass Co.* v. *McCaleb*, 81 id. 562.

The only remedy for an excessive assessment is by application to the board of review, or county board. *People* v. *Big Muddy Iron Co.* 89 Ill. 116; *Madison County* v. *Smith*, 95 id. 335; *Adsit* v. *Lieb*, 76 id. 198.

As to the *situs* of personal property for taxation, counsel cited *King* v. *McDrew*, 31 Ill. 418; *Irwin* v. *Railroad Co.* 94 id. 105; *Tazewell County* v. *Davenport*, 40 id. 197; *Sangamon and Morgan R. R. Co.* v. *Morgan County*, 14 id. 163; *Minard* v. *Lawler*, 26 id. 301; *First National Bank* v. *Smith*, 65 id. 54; *Wilkey* v. *City of Pekin*, 19 id. 160; *Mills* v. *Thornton*, 26 id. 300; *City of Dunleith* v. *Reynolds*, 53 id. 45; *Danville Banking and Trust Co.* v. *Parks*, 88 id. 170; *Munson* v. *Crawford*, 65 id. 185; Story's Conflict of Laws, sec. 550; Burroughs on Taxation, 59.

Opinion of the Court.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court:

This was a bill brought by Frederick M. Atkinson, appellee, to enjoin the collection of taxes assessed on personal property in the town of South Chicago, for the year 1881. It appears from the bill, that appellee is a manufacturer of railroad car springs; that the shops are located and business carried on in the town of Proviso; that the assessor of that town, on or about May 1, 1881, without notice to appellee, and without his knowledge, assessed all of his property, both real and personal; that the taxes were extended by the county clerk, and have since been paid. It also appears from the bill, that the office of appellee was, on May 1, 1881, located on Washington street, South Chicago, but he had no property in that town except office furniture. The bill also contains the following allegation:

"Your orator further says, that on or about May 1, 1881, Frank Drake, the duly qualified and acting assessor in and for said town of South Chicago, left at the office of your orator aforesaid a blank schedule, used by said assessor for listing personal property for taxation, together with a notice to your orator to fill out the said schedule, according to instructions thereon, and return the same, when so filled out, to him, the said assessor, at his office in said town of South Chicago; and your orator says that, not understanding the said schedule, nor the effect thereof, he went to the office of the said assessor, to-wit, on the 19th day of May, A. D. 1881, and then and there informed him, the said assessor, or his duly authorized and acting deputy in charge of the office of said assessor, that he was a manufacturer, and that his business was carried on in the town of Proviso, said county of Cook, as hereinbefore more fully set forth. And your orator further says, that the said assessor or his said deputy, well knowing your orator was a manufacturer, and that his business was carried on in said town of Proviso, and that the

said property was located in, subject to, and would be assessed in said town of Proviso for the several purposes as hereinbefore set forth, and well knowing the said property was exempt from assessment or taxation in said town of South Chicago, pursuant to the provisions of sec. 13, chap. 120, entitled Revenue, Revised Statutes of Illinois for 1881, and well knowing that the said property was beyond and without the jurisdiction of him, the said assessor of said town of South Chicago, wrongfully, willfully and fraudulently, and with intent to injure and defraud your orator, thereupon then and there told your orator that said property was subject to assessment either in said town of South Chicago or said town of Proviso, and that in either event the taxes would be the same, and your orator being uninformed in the premises, except as aforesaid, and relying upon the said statement of the said assessor, or his said deputy, and having no knowledge, information or belief that his said property would be subject to taxes for said city of Chicago, South Park assessments, or said town of South Chicago, by mistake, and by misunderstanding the effect of signing said schedule, and under the order and direction of said assessor, or his said deputy, and without any knowledge of his rights, duties and obligations in the premises, he was wrongfully and fraudulently induced and prevailed upon by said assessor, or his said deputy, to sign a schedule of all his personal property," etc.

It is also alleged in the bill that the taxes on the assessment amount to $300.36, and that the collector of the town of South Chicago holds a warrant for the collection of the same; that $2.97 is the amount due on the office furniture, and the balance is for the property situated in the town of Proviso. The defendants interposed a demurrer to the bill, which the court overruled, and rendered a decree enjoining $297.36 of the tax, to reverse which the defendant appealed.

Section 5, chap. 120, of the Revised Statutes of 1874, provides that personal property shall be listed between the first

day of May and first day of July of each year, when required by the assessor, with reference to the property owned on the first day of May. Section 24 declares that persons required to list personal property shall make out and deliver to the assessor, at the time required, a schedule of all personal property in their possession or control required to be listed for taxation by them. It shall be the duty of the assessor to determine and fix the fair cash value of all items of personal property. Section 13 provides that personal property of manufacturers shall be assessed in the town where the business is carried on. The law presumes that complainant knew the provisions of the statute in relation to the assessment of property, and he can not rely upon his ignorance to defeat the collection of the revenue.

The complainant resided in the town of South Chicago, and made return of his property to the assessor of that town, who made the assessment, but he claims that he was deceived by the assessor, and that the assessment was fraudulent. The *gist* of the charge in the bill, which is supposed to render the assessment fraudulent, is, that the assessor told complainant that the property was subject to assessment either in the town of South Chicago or the town of Proviso, and the taxes would be the same if assessed in either town. Conceding the truth of this statement, it can not render the assessment fraudulent. Complainant had no business to rely upon the statement of the assessor in regard to what the law was in reference to the town in which the property was liable to be assessed, and if he did so, and has suffered loss, it is his own fault. He was under no obligation to rely on the statement of the assessor, but it was his duty to ascertain from some other source where he ought to list his property. It is perhaps true that the assessor of the town of South Chicago could not have assessed the property in that town without the consent of the complainant, but when the complainant voluntarily made a return of his property to the assessor, it

was the right and the duty of the assessor to make the assessment. It was not the business of the assessor to inquire whether the property returned all had a *situs* in his town or not. It was enough that complainant kept his business office in the town of South Chicago, and desired to be assessed in that town. We think it a safe rule to hold that where a person makes out and delivers to the assessor a schedule of the amounts, quantity and quality of all personal property in his possession required to be listed for taxation by him, as provided by section 24, he should be bound by such a return.

The decree of the circuit court will be reversed, and the cause remanded.

Decree reversed.

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JOHN I. BENNETT

v.

BRIDGET CONNELLY.

Filed at Ottawa May 12, 1882.

1. APPEAL *from Appellate Court—reviewing the facts.* On affirmance of a judgment in assumpsit by the Appellate Court, it will be taken that such court found the facts the same as the jury, and this court is precluded from inquiring into the correctness of such finding.

2. This court can only look to the facts, as found by the Appellate Court, to determine whether the law was correctly applied to the facts.

3. INSTRUCTION—*should be given if properly asked.* It is error to refuse an instruction which accurately states a rule of law applicable to the issues and evidence, when that rule is not announced in any others given.

4. ACTION—ATTORNEY AT LAW—*right to recover for services and advances.* An attorney at law who performs legal services for another with his consent, and advances and pays money for his client while acting as his solicitor, in matters connected with his employment, is entitled to recover the reasonable value of such service, and the amount of the money so advanced.

Brief for the Plaintiff in Error.

5. SAME—*for money had and received—measure of recovery.* A plaintiff has a right to recover, in an action for money had and received, only such sum as in equity belongs to him.

6. Where an attorney received a sum of money from the purchaser of property at a sale on partition of land as a part of the price which was paid him to prevent the sale from being opened and a re-sale ordered, his client, who is entitled to only one-half of the property sold, or its proceeds, will not be entitled in a set-off to recover the whole sum thus received by the attorney, but only one-half thereof, and the attorney will be liable to the other owners for the balance.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on writ of error to the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. FRANK J. CRAWFORD, and Mr. W. J. HYNES, for the plaintiff in error:

Attorneys may contract with their clients for conditional and contingent fees, and a contract that the attorney shall perform services and receive satisfaction in a share of the property or claim involved in suit, or in a percentage on the value of the property recovered, or out of the funds collected, is valid and binding. *Smith* v. *Young et al.* 62 Ill. 211; *Newkirk* v. *Cone,* 18 id. 449; *Johnson* v. *Bright,* 15 id. 465; *Morgan* v. *Roberts,* 38 id. 79; *Wilhite* v. *Roberts,* 4 Dana, 172; *Topley* v. *Coffin,* 12 Gray, 420; *Ramsey's Devisees* v. *Trent,* 10 B. Mon. 341; *Thalhimer* v. *Brinkerhoff,* 3 Cow. 643; *Fitch* v. *Gardenier,* 2 Keyes, 516; *Bayard* v. *McLane,* 3 Harr. 217.

Attorneys are protected in advances made to their clients from motives of humanity, after actions brought. *Bristol* v. *Dunn et al.* 12 Wend. 142; *Currie* v. *Cowles,* 6 Bosw. 452.

A demand to be set off must arise *ex contractu,* and not *ex delicto.* Barbour on Set-Off, 32; *Sargeant* v. *Kellogg,* 5 Gilm. 280; *Robinson* v. *Hibbs,* 48 Ill. 410; *East* v. *Crow,* 70 id. 94; *Le Lois* v. *Crow,* 4 Camp. 134; *Gillett* v. *Mawman,* 1 Taunt. 137; *Sherman* v. *Ballou,* 8 Cow. 304; *Dowland* v. *Thompson,* 1 Wm. Black. 910; *Freeman* v. *Hyett,* 1 id. 394;

Heck v. *Shever*, 4 Serg. & R. 249; *Adams* v. *Manning*, 17 Mass. 179.

So, where the alleged damages arise out of the same subject matter, and arise *ex delicto*, they can not be set off, but must be *recouped*. And in such case they can never exceed the plaintiff's demand. *Stow* v. *Yarwood*, 14 Ill. 426; *Brigham* v. *Hawley*, 17 id. 39; *Babcock* v. *Trice*, 18 id. 421; *Schuchman* v. *Knoebel, Exr.* 27 id. 178; *Christy* v. *Ogle's Exr.* 33 id. 298; *Lunn et al.* v. *Gage*, 37 id. 29; *Streeter* v. *Streeter*, 43 id. 161; *McDowell et al.* v. *Milroy*, 69 id. 500; *Howell* v. *Goodrich*, 69 id. 560; *Waterman* v. *Clark et al.* 76 id. 430; Barbour on Set-Off, 26, 29; *The United States* v. *Buchanan*, 8 How. 105.

If the defendant was entitled to recover a set-off, it should have been only for her interest in the same, and not for the entire sum.

Messrs. SWETT, BATES & HASKELL, for the defendant in error:

It is the general policy of courts, in cases between client and attorney, to protect the suitors, and not to suffer any advantage to be taken of them. 1 Story's Eq. Jur. secs. 310, 312; *Warmsley* v. *Booth*, 2 Atk. 25.

While it is true the plaintiff was guilty of a tort in the way he obtained the money, the defendant had a right to waive the tort and sue for the money, if she chose. *Schuyler* v. *Smith*, 51 N. Y. 309; *Rose* v. *Mynatt*, 7 Yerg. 30.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, brought by plaintiff in error, to recover for services as an attorney, and for money advanced. He claimed $2300. Defendant in error filed a plea of set-off. A trial was had, resulting in a verdict and judgment in favor of defendant, in the sum of $5037.31, and costs. The case was removed to the Appellate Court for

the First District, where, on a trial, the judgment of the Superior Court was affirmed. It is brought to this court, and a reversal is asked.

The facts of the case are argued at great length, the evidence contrasted and weighed and balanced, to show the jury were mistaken in their finding. We can hardly believe that counsel could suppose we would not remember that the 89th section of the Practice act (Sess. Laws, 1877, p. 153,) expressly prohibits this court from considering controverted questions of fact, but confines us alone to questions of law in this class of cases coming from the appellate courts. This has been frequently announced in reported cases. We can not suppose counsel were not aware of so important a provision of our Practice act, and the decisions of this court. The Appellate Court having affirmed the judgment of the Superior Court, it must be taken that on a full consideration of the evidence it found the facts as was done by the jury. We can only look to the facts, as thus found, to determine whether the law was correctly applied to the facts. We may also determine whether the Superior Court erred in its rulings in the progress of the trial.

It is not disputed that defendant in error was, in the lifetime of one Charles Dunn, his wife; that he purchased 110 acres of land in the vicinity of Calumet lake, in Cook county; that he died seized of the property, leaving no children or descendants of children, but leaving defendant his widow, and some collateral heirs; that they subsequently commenced proceedings for a partition, and defendant filed a cross-bill claiming that she furnished the money to make the purchase in her name, but the husband took the deed to himself, and not learning the fact until after his death, she claimed that there was a resulting trust in her favor, and asked to have it established. On a trial the claim was decided against her. The land being reported not susceptible of division, it was decreed to be sold. It was sold for $22,100.

In defending the partition suit, and in asserting her claim to the whole title to the land, she employed Kretzinger & Johnson as attorneys to protect her interests. They held a note on her for $6000 as a retainer, and a trust deed on the land to secure its payment. Some months after its date plaintiff in error became a member of the law firm, and its name was changed. This retainer was turned over to the new firm as a part of its business. Plaintiff in error becoming the owner of three-eighths of the note and trust deed, subsequently, on a dissolution of the firm, in the settlement became its sole owner. Defendant in error denied that she ever executed the note and deed of trust, and claims they are forgeries. After the land was sold other parties than the purchasers asked to have the biddings opened, and offered to raise them more than $5000 on the sum at which they were struck off to the purchaser. This application was denied by the court, and the sale was confirmed.

Defendant in error claims that plaintiff in error combined with the parties who became the purchasers of the property, for its sacrifice, and that she thereby sustained the loss of the difference in the price received and the price offered, had the biddings been opened. She claims that plaintiff in error sold the note and trust deed to one Bowen for $7000; that if Bowen became the purchaser at $125, he was to treat the note as paid, and satisfy the note and trust deed, and plaintiff in error to retain the money paid him for the note; that the land was struck off at a much higher price; that pending the motion to open the biddings, Beach, who held this note and trust deed, gave notice of the fact to her solicitors, and claimed it was a lien on her share of the property. The purchasers and her attorneys made some arrangement by which the note and deed of trust were cancelled. They claim it was by the purchasers paying Beach $7000 which plaintiff in error owed him, and to secure which Beach held the instruments, and upon defendant in error agreeing to pay one-half

of the taxes on the land, and the purchasers agreeing that she should have the privilege of removing the buildings on the land, the matter was thus arranged, and the motion to open the biddings was denied, and the sale confirmed.

It is claimed that the money paid to Beach was an advance on the bid at which the property was struck off to the purchasers, and being a part of the purchase money. The evidence is by no means definite as to the manner in which payment was made to Beach or the amount paid; but the jury seem by their finding to have considered the amount as $7000, and whilst the evidence is not explicit, it would justify the conclusion that whatever the sum, it was paid by the purchasers. This seems to be the preponderance of the evidence, and it certainly would justify such a finding.

These are the leading facts in the case, and being prohibited from considering the evidence to determine whether or not the jury found correctly, we shall proceed to determine whether the jury were properly instructed as to the law arising on the evidence, omitting the discussion of other questions raised and discussed by counsel.

It is urged that the Superior Court erred in refusing plaintiff's instructions. This is the first:

"If the jury find from the evidence that the plaintiff has performed services for the defendant, with her consent, since September, 1873, and has advanced and paid moneys for her while acting as her solicitor, in matters connected with her employment, they will find for the plaintiff a reasonable value for such service, as shown by the evidence, and also the amount of moneys which the evidence shows he has advanced for her."

This instruction accurately states a rule of law clearly applicable to the issues and evidence in the case, nor do we find that the rule was announced in any other instruction that was given. It was error to refuse it.

Again, it is claimed that the purchaser, to avoid litigation, took up the note and paid Beach, who then held the note and deed of trust, the amount it was pledged to secure of money he had loaned to plaintiff in error, to prevent the property from being again offered for sale, and that plaintiff in error thus received the advance that prevented the biddings from being opened, and it is urged, as plaintiff in error received $7000 of the purchase money of the property, defendant in error has a right to recover it from him. If it be true that Beach received that amount of the price for which the property was actually sold, and not at what it was bid off, and it paid the debt plaintiff in error owed him, and he thereupon released the deed of trust, the sum thus paid was a part of the purchase money of the entire tract, and not on the half owned by the defendant in error. There can be no pretense that she had any title or claim to more than one-half of the land, and could have none to more than one-half of the sum for which it was sold. If this $7000, paid Beach for plaintiff in error, was a part of the price paid for the land, as the jury seem to have found, she had the title to but half of that amount, and it was error, on the evidence, to instruct as the court did, that she was entitled to recover more than one-half, unless it be the sum she paid for taxes, and the value of her house she was, under the compromise, permitted to remove from the land. After deducting that sum, the other heirs were entitled to one-half of the sum thus paid to Beach for the use of plaintiff in error.

If defendant in error is entitled to recover for money had and received by plaintiff in error, she is not entitled to recover unless it in equity is hers. That action is in the nature of an equitable demand. She having failed to show she has a legal or equitable claim to the whole of this $7000, if the evidence proves a liability to her at all, it is but for half of that sum, and the other half to the heirs. And this is so if the recovery arises *ex contractu*. If the law implies a lia-

bility on the relation shown for a recovery in assumpsit, it is but for one-half. If the action is *ex delicto*, the liability of plaintiff in error to the other heirs does not inure to her benefit. His liability is to them as well, and not alone to her. She has no more right to recover and use their money than has plaintiff in error. She has no right, either in law or equity, to recover and have their money. It was therefore error for the court to instruct the jury, on the evidence, even if it proved all that was claimed, that she could recover the $7000, or the balance of that sum after deducting all of the claim of plaintiff in error that he established by his evidence.

For these errors in the instructions the judgment of the Appellate Court must be reversed, and the cause remanded.

Judgment reversed.

Mr. JUSTICE MULKEY: I do not concur in the conclusion reached in the foregoing opinion. The judgment of the Appellate Court, as is conceded, is conclusive upon all questions of fact. I am therefore unable to perceive upon what principle this court can raise any question as to the amount of recovery, when it is substantially conceded there might properly be a recovery for some amount. If there was a right of recovery at all, the amount was clearly a question for the jury. But outside of this, I am of opinion the judgment of the Appellate Court is proper, and should therefore be affirmed.

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HENRY LOWE

v.

HENRY FOULKE *et al.*

Filed at Ottawa May 12, 1882.

1. PRACTICE IN THE SUPREME COURT—*entering proper judgment—in ejectment—after remittitur.* Where judgment in ejectment was erroneously rendered in favor of the plaintiff for an entire tract of land, the proof showing title to an undivided part of the premises in another person not a party, whose precise interest was not disclosed by the record, it was *held*, that this court could not, on appeal, allow a *remittitur*, and render final judgment for the recovery of the plaintiff's interest, for the reasons that the outstanding interest was not made certain, and because the defendant was entitled to a new trial under the statute at any time within a year from the date of the judgment below, on payment of the costs.

2. NEW TRIAL—*in ejectment—under the statute—applies only to the trial courts.* The statute giving the unsuccessful party in an action of ejectment a right to take a new trial within one year after judgment, by paying the costs, applies only to judgments in the circuit court, and does not authorize the vacation of a final judgment in such a suit in this court.

3. PRESUMPTION—*as to death of a person.* Where it is shown that a person was living some years before the trial of a suit, no presumption will arise, in the absence of proof, that he has since died.

APPEAL from the Circuit Court of Will county; the Hon. FRANCIS GOODSPEED, Judge, presiding.

Mr. THOMAS H. HUTCHINS, for the appellant.

Mr. D. H. PINNEY, for the appellees.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

It is clear the present judgment can not stand. The action is ejectment, and purports to have been brought by all the heirs at law of Joseph Foulke, deceased, against Thomas Martin and Henry Lowe, to recover an eighty-acre tract of land, described in the declaration. Plaintiffs claim, by the pleadings, the fee simple title to the premises as heirs at law

of the decedent, and on the trial recovered a judgment for the entire tract. From that judgment Henry Lowe has appealed to this court. Martin, the other defendant, being his tenant, and claiming no title to the land, defends no farther.

Should it be conceded the proof shows the title to the premises was in the ancestor of plaintiffs, it appears they have recovered more than belongs to them. One of the devisees,—that is, Mary F. Stone, a daughter of the testator, and wife of Henry A. Stone,—died after the death of the testator, leaving three children, only two of whom were living when this suit was brought. The record is silent as to whether Henry A. Stone, husband of Mary, is still living. It appears he was living at the time of the making of the will, because the testator refers to his daughter Mary as the wife of Henry A. Stone. In the same paragraph he refers to his daughter Sarah as widow of Peter Smith. Had Mary been a widow then, no doubt the testator would have referred to the fact, as he did in relation to his other daughter. In the absence of proof, no presumption will be indulged that he has since died. He would, if living, be an heir to his deceased child with his other children, and may be he would be a tenant by the curtesy of the lands of his wife, and entitled to a life estate in the same. But in regard to the latter estate the evidence in the record is not full enough to enable the court to determine. At all events, if living, Henry A. Stone has some interest in the premises. He is not a co-plaintiff, and yet the present plaintiffs have recovered judgment for the entire property. The error in the finding of the court in this regard is fatal to the present judgment.

Counsel for plaintiffs asks to be permitted to enter a *remittitur* in this court as to the interest of Henry A. Stone in the property. Two objections stand in the way,—first, the evidence does not disclose definitely what interest he has in the premises; and second, under the statute of this State a defendant in ejectment, on paying the costs of suit at any

time within a year from the date of the first trial, may have a second trial of the case without assigning any reason for it. Should final judgment be entered in this court, such as it might be thought the circuit court should have rendered on the evidence, the anomalous condition would appear of a final judgment in this court standing unvacated, and yet the case being tried *de novo* in the circuit court, where a different judgment might be rendered. This ought not to be. It is the judgment of the circuit court defendant may have vacated under the statute, and not an original and different judgment in this court. The statute has not provided he may have an original judgment of this court vacated, as the judgment of the circuit court in ejectment may be. There does not appear by the record to have been but one trial of the case in the circuit court, and that was on the 4th day of October, 1881. So there still remains time in which defendant can pay the costs, and take a new trial in the circuit court, under the statute.

No opinion will now be expressed touching the validity of the tax title set up as a defence to the action. The view taken renders that discussion unnecessary at the present time.

On account of the error indicated, the judgment of the circuit court will be reversed and the cause remanded.

Judgment reversed.

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LUCINDA E. BLANCHARD

v.

ISAAC N. MAYNARD *et al.*

Filed at Ottawa May 12, 1882.

1. WILL—*time when title vests in beneficiaries.* A testator devised all his estate, real, personal and mixed, to two persons, in trust, to take care of and manage the same, declaring the trust should continue for ten years after his death, and no longer, and then provided: "It is my will that at the expiration of the trust hereinbefore declared, that is to say, at the end of ten

years after my decease, all of my said estate then remaining, and the income thereof, shall be distributed and vest in my three sons," naming them, "and their heirs, and I do hereby give, devise and bequeath the same to them; but in case that either of my said three sons should die leaving no issue of their bodies, then I give, devise and bequeath my estate to the survivor of them:" *Held*, that no title under the will was intended to be vested in either of the testator's sons until ten years after his death, and that the widow of one of the sons who died before that time leaving no issue of his body, took no estate as heir of her husband, or dower as his widow, in the testator's real estate.

2. SAME—*construction—intent as gathered from will alone governs.* In construing wills the intention of the testator must govern when ascertained, and this intention must be sought for in the language of the will itself, without the aid of extraneous evidence.

APPEAL from the Superior Court of Cook county; the Hon. GEORGE GARDNER, Judge, presiding.

Mr. CHARLES H. ROBERTS, and Messrs. MANAHAN & WARD, for the appellant:

1. We contend that on the death of the testator the beneficial interest in the estate vested at once in the three sons, subject only to the chattel interest of the trust term.

2. That the real estate vested subject to be divested by a sale by the trustees, which power not having been exercised, ended with their term.

3. That the clause of survivorship is void for repugnancy, except as to deaths in the testator's lifetime.

4. That a clause of unrestricted survivorship in case of death without issue, is void for remoteness, and the clause of survivorship is unintelligible.

5. That the terms of survivorship refer to the death of the testator.

That the beneficial interest vested at once in these sons on the death of the testator, see *Boraston's Case*, 3 Coke, 19; *Richardson* v. *Power*, 33 Beav. 163; *Moore* v. *Lyons*, 25 Wend. 143; *Collier's Will*, 40 Mo. 287; *Doe* v. *Prigg*, 8 Barn. & Cress. 689; *Doe* v. *Considine*, 6 Wall. 471; *Hansford* v. *Elliott*, 9 Leigh, 79; *Coxall* v. *Sherard*, 5 Wall. 268; *Blanch-*

ard v. *Blanchard*, 1 Allen, 223; *Duryea* v. *Duryea*, 85 Ill. 41; *King* v. *Isaacson*, 1 Sm. & Gif. 371; *Hempstead* v. *Dickson*, 20 Ill. 193; *Illinois Land and Loan Co.* v. *Bonner*, 73 id. 325; *Hunt* v. *McCartney*, 18 id. 130; *Nicoll* v. *Scott*, 99 id. 539.

That the interest vests when the gift is independent of the clause of distribution, see *King* v. *Isaacson*, 1 Sm. & Gif. 371; *In re Bartholomew*, 1 Mac. & G. 353; *Nicoll* v. *Scott*, 99 Ill. 539.

So, too, when there is a receipt of profits during the intermediate term. *Eldridge* v. *Eldridge*, 9 Cush. 516; *Hansford* v. *Elliott*, 9 Leigh, 79.

A clause of survivorship to survivors and their heirs in case of death without issue, extending to an indefinite failure of issue, has always been held void for remoteness.

As to personalty, see 3 Jarman on Wills, (Rand. & Talc. ed.) 318, 330; *Kirkpatrick* v. *Kirkpatrick*, 13 Vesey, Jr. 476; *Massey* v. *Hudson*, 2 Merrivale, 130.

As to realty, see *Beauclerk* v. *Darmer*, 2 Atk. 308; *Barlow* v. *Salter*, 17 Vesey, Jr. 483; *Saltern* v. *Saltern*, 2 Atk. 376; *Williams* v. *Jekyl*, 2 Vesey, Sr. 682; *Ide* v. *Ide*, 5 Mass. 499; *Patterson* v. *Ellis*, 11 Wend. 266; *Hall* v. *Chaffee*, 14 N. H. 220.

That the will devises real estate, and if it did not it is marked by all those elements which have led courts to depart from the doctrine of *Cripps* v. *Wolcott*, see *Nicoll* v. *Scott*, 99 Ill. 538; *Doe* v. *Prigg*, 8 Barn. & Cress. 221; *Passmore's Appeal*, 23 Pa. St. 382.

Messrs. J. P. & T. R. WILSON, for the appellees:

The words "of survivorship," in the eighth article of the will, should be referred to the period fixed by the will for the distribution of the estate. *Ridgeway et al.* v. *Underwood et al.* 67 Ill. 419; *Blatchford et al.* v. *Newberry et al.* 99 id. 11; 2 Jarman on Wills, 462; *Knight* v. *Poole*, 32 Beav. 548;

Stevenson v. *Gullon*, 18 id. 590; *Spurrell* v. *Spurrell*, 11 Hare, 54; *Young* v. *Robertson*, 8 Jur. N. S. 825; *Linton* v. *Boyd*, 19 Ohio St. 30; *Olney* v. *Hull*, 21 Pick. 311; *Teed* v. *Morton*, 60 N. Y. 503; 2 Williams on Executors, (7th ed.) 1576.

The clause of survivorship is not unintelligible. The rule of law is well settled that where two clauses or gifts are irreconcilable, and can not stand together, the clause which is last must prevail. 1 Jarman on Wills, 397; Redfield on the Law of Wills, 443.

The will vested the fee in the premises in the trustees. A power of sale, even on a contingency, confers a fee. Lewin on Trusts, 251; Perry on Trusts, sec. 315.

Mr. JUSTICE WALKER delivered the opinion of the Court:

About the 17th day of December, 1867, one Seth Blanchard died, the owner of some lots in the city of Chicago, with other property. Previous to his death he made and executed his will, which was duly probated after his death. By it he devised all of his property, real, personal and mixed, of every description, to Wm. A. Allen and O. F. Roler, in trust, to take care of and manage the same; to have and receive the rents, issues, income and profits, and out of the same to pay all taxes, assessments, premiums on insurance, interest on incumbrances, repairs, and out of the estate to discharge incumbrances, with full and ample power and authority to sell and convey or to mortgage, or both, all or any portion of the estate, but only for the purpose of raising money to extinguish debts and incumbrances thereon, or to improve the property in case of loss by fire, etc. He declared the trust should continue for ten years after the time of his death, and no longer. The eighth clause is this: "It is my will that at the expiration of the trusts hereinbefore declared, that is to say, at the end of ten years after my decease, all of my said estates then remaining, and the income thereof, shall be distributed, and shall vest in my three sons, Samuel

A. Blanchard, Henry S. Blanchard and Joseph G. Blanchard, and their heirs, and I do hereby give, devise and bequeath the same to them; but in case that either of my said three sons should die leaving no issue of their bodies, then I give, devise and bequeath my estate to the survivor of them and their heirs."

About the first day of February, 1867, Joseph G. married appellant, and died on the 13th of May, 1873, intestate, leaving no child or descendants of a child surviving him, but leaving appellant, his widow. After the death of Joseph G., Henry conveyed the premises to Samuel, and he and his wife, on the 18th of October, 1879, conveyed to I. N. Maynard, and he, on the 15th of March, 1880, conveyed a portion of the premises to appellees Adams and Spaulding. On the 4th day of June, 1881, appellant filed this bill, setting up the facts as here stated, claiming to be the owner in fee of an undivided one-sixth part of the property, and to have dower in another undivided sixth part. Defendants filed a demurrer to the bill, and on a hearing it was sustained by the court, and the bill was dismissed. From that decree complainant appeals to this court, and urges a reversal.

The whole controversy turns on the true construction of the eighth clause of the will. Appellant claims that by its provisions Joseph, her husband, immediately on the death of the testator, took a fee simple estate in the premises, and having died without children or descendants of children, and leaving her his widow, she, under the statute, took one-half of his third in fee, and her dower in the other half of that third. Appellees contend that under that clause the trustees took an estate in the premises, to hold until the period for distribution should arrive, and then the fee to vest in the devisees or the survivors, or the children of such as might have died before the period arrived,—that this being the true construction of the clause, the title vested in Henry and Samuel, and they, by *mesne* conveyances, hold the fee.

In giving construction to wills, the intention of the testator, as manifested by the instrument itself, when ascertained, must control. This rule is coeval with wills themselves. It is the purpose of the law enabling men to make wills, that they may dispose of their property that it may descend according to their intention. Any other rule would defeat the great object of permitting the disposition of their estates by will. It is then the duty of courts to ascertain and enforce that intention, and in doing so they are confined to the will itself, and are precluded from seeking aid from extraneous evidence. What, then, was the testator's intention as expressed in this will? By the second clause he devises and bequeaths all of his property of every kind to the persons named as trustees. The language of the devise is broad and comprehensive. If it were not limited by the trusts imposed in what follows, they would have taken an absolute and unlimited fee. But he declares the title thus taken shall be to hold in trust for the purposes specified, and he in them declares, by the eighth clause, that when the trustees shall have held it for ten years after his death, all of his property then remaining, etc., shall vest in his three sons (naming them), and limits it to the survivors in case of the death of either leaving no heirs of his body. How and when to vest in them? In fee, of course, and at the end of ten years from the time of his death. That is the period testator fixed for the title to vest in his beneficiaries. He says so in terms plain and unmistakable. He does not say that the property shall then be distributed, or a division merely made, but it shall at that time vest in his three sons and their heirs. Of this there would seem not to be the slightest question. When he says the property shall then vest in them, it excludes every presumption that he intended that it should vest before or after that time. It unerringly points to and names that as the precise period when the title shall vest in them, because he in terms fixes that as the period when the

title shall vest, and not merely as the period when the property should be divided, and a mere distribution was not intended. If he only intended that it should be distributed at that time, why superadd the term that the property should then vest in the beneficiaries?

The word "survivor," used in the eighth clause, unmistakably refers to the period when the trust ceases, and not to the time of the death of testator. This is the only fair and reasonable construction that can be given to the language employed. It is its manifest import, and to hold otherwise would be too refined and constrained a construction. He was making provision for the title to pass from the trustees and to vest in the beneficiaries. He had, in a previous part of the same clause, fixed the time at ten years after his death as the period when the property should be distributed and vest in his three sons, or the survivor. If there is any doubt arising in the clause where the word "survivor" is used, it is fully explained by the previous part of the paragraph fixing the period when the title should vest in the beneficiaries, and that excluded and prevented it from vesting before the period named. There can be no question, from the language of the will, that testator intended that on his death the title should vest and remain in the trustees for ten years, and he says it should then vest in the beneficiaries. We can not, in the absence of clear and explicit language, suppose he intended the title to vest in both the trustees and the beneficiaries at the time of his death, but such a supposition is repelled by what he said in the eighth paragraph.

Again, and for the purpose, no doubt, of preventing such a construction, he devises the property in terms in joint tenancy, and not to them as tenants in common. This was done that in case of the death of either of the trustees the other should take the title held by the one deceased, by survivorship, thus investing in him the entire title. He thereby precluded all claim of descent or the vestiture of title in the

beneficiaries, until the time named for it to vest in them should arrive. He thus most clearly precluded the idea that the beneficiaries should in any event become invested with title, either in whole or in part, until the expiration of ten years after his death.

Counsel have shown much research, and have invoked much of the abstruse learning on the question of when a remainder shall be regarded as vesting in the grantee or donee, but we regard the cases as inapplicable to the construction of this will. Had testator not named the time specifically when the title should vest in the devisees, it may be the cases referred to might have been applicable, but we shall not now stop to inquire, as it would answer no beneficial end.

It then follows that Joseph G. Blanchard never was invested with such a title or interest in the property in controversy as could or did descend to his heirs. Hence it follows that appellant took neither a fee nor a dower estate in the premises, and the court below did not err in denying the relief prayed, and the judgment is affirmed.

Judgment affirmed.

Galena and Southern Wisconsin Railroad Co., for use, etc.

v.

Frederick Stahl.

Filed at Ottawa May 12, 1882.

1. Garnishment—*debtor's obligations given in pledge, and afterwards surrendered to him.* Railroad bonds of a railway company, not sold and negotiated, but merely pledged by it as collateral security, when discharged and surrendered are not property of the company liable to be reached by garnishment against an officer of the company receipting for the same, but who in fact never received them.

Statement of the case.

2. SAME—*whether property interest passed on sale under foreclosure, as to bonds given in pledge.* Where a railway company pledged twenty-eight of its bonds as collateral security for a bank debt, which were included in a subsequent foreclosure decree in a suit for and in behalf of all the bondholders, and a committee of certain holders of the bonds purchased the property, for the costs of the suit, for the benefit of the bondholders contributing towards the payment of the costs, not including the company to whom the twenty-eight bonds had been surrendered by the bank, and upon which bonds no assessment was paid, and a new company was formed by the persons interested in the purchase: *Held*, that the original company took no interest in the purchase as a holder of its own bonds so taken up, and had no property in the purchase liable to be reached by garnishment.

3. DECREE—*construed—as to whether for payment of certain pledged bonds.* A decree for the foreclosure of a railroad mortgage securing bonds of the company, found the sum due on twenty-eight bonds pledged by the company as collateral security for a debt of the company, which debt was also secured by a deed of trust, and ordered sale of the property, subject to the trust deed, for the whole sum found due on all the bonds, and that the bonds so pledged, or the judgment thereon in the foreclosure suit, and the personal property pledged, should be surrendered: *Held*, that the latter part of the decree neutralized the portion of it for the payment of the twenty-eight bonds, and, taken together, was no decree for their payment.

4. APPEAL—*from Appellate Court—reviewing facts—presumption as to finding by that court.* On affirmance of a judgment or decree by the Appellate Court, in the absence of anything in the record showing what was the finding of fact, it will be taken to have been in the way most favorable for the support of the decision made, and this court will not review the facts.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Jo Daviess county; the Hon. WILLIAM BROWN, Judge, presiding.

This was a proceeding by garnishment, under the statute, against Frederick Stahl, president of the Galena and Southern Wisconsin Railroad Company, as garnishee, to subject a supposed interest held by the railroad company, acquired under the foreclosure sale of the company's mortgaged property, to the payment of a judgment of Madison Y. Johnson against the company. On a hearing had before it, the circuit court discharged the garnishee, which judgment was affirmed

on appeal to the Appellate Court for the Second District, and an appeal taken to this court.

The supposed interest sought to be reached is claimed to arise in respect to twenty-eight bonds of the company, which had been deposited with the National Bank of Galena as collateral security for certain indebtedness of the company to the bank. In 1872 the railroad company executed its mortgage upon its property and franchise to secure the payment of four hundred of its own bonds, of $1000 each, with interest. Twenty-eight of these bonds were deposited by the company at different times with the National Bank of Galena, to secure three notes given to the bank for the debt of the company. The first note was for $2276.65, dated April 29, 1875, and was signed individually by four persons, then directors of the company, for the collateral security of which the company deposited ten of the twenty-eight bonds. The next note was for $4671.20, dated June 30, 1877, and signed individually by the directors of the company. For the collateral security of this note the company deposited eleven of said twenty-eight bonds. The last note was for $2127.80, dated June 30, 1877, and signed by the company only, for the collateral security of which the company deposited the remaining seven of the twenty-eight bonds.

In September, 1878, the railroad company executed to William W. Wagdin a deed of trust upon all of its property and franchises, to secure the payment of the three notes referred to, the bank continuing to retain the twenty-eight bonds as collateral security for the debt. At the February term, 1879, of the circuit court of Jo Daviess county, a decree of foreclosure of the original mortgage was entered of record, and an absolute sale, subject to the Wagdin deed of trust, was ordered of all the mortgaged property, to pay the mortgage bonds and interest. The bank proved up the twenty-eight bonds before the master, and in the decree a judgment was rendered on them, for "the use of the bank." On May 3,

1879, a sale took place, under the decree, to a committee appointed to make the purchase by and for the bondholders, or a portion of them, who had entered into an agreement to form a new company, and assessed on each bond the sum of five dollars, to pay the costs and expenses of the foreclosure. The mortgaged property was bid in by this committee for $2000. The purchasers formed a new railroad company, subscribing in it as stock the amount due them from the old company, at fifty cents on the dollar. This new company elected officers, and operated the road up to April, 1880. In April, 1880, the Chicago and Northwestern Railroad Company purchased the stock of this new organization, and thus became the owner of the property. On the 26th of the same month it paid the bank debt secured by the Wagdin deed of trust, and on the same day the garnishee, Stahl, as president of the Galena and Southern Wisconsin Railroad Company, gave to the bank his receipt, stating that the twenty-eight bonds deposited with the bank, as collateral security for such debt, had on that day all been returned back to that company. The garnishee answered that the company was entirely insolvent, and without any property since the foreclosure sale, and that at and since the service of process on him he had no property of the company in his possession, power or control. Issue was taken upon the truthfulness of the answer, and the foregoing facts were relied upon as sustaining the issue against the garnishee.

Mr. M. Y. JOHNSON, for the appellant.

Messrs. D. & J. J. SHEEAN, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

As in the decree of foreclosure judgment was rendered on these twenty-eight bonds for the sum of $36,360, the amount due upon them, and that constituted a part of the whole amount of the decree upon which the mortgaged property

was sold, it is contended by appellant that by the return by the bank to the company of these twenty-eight bonds there reverted back to the company so much of the property sold to satisfy the decree as was represented by $36,360 of the decree. This would be treating these twenty-eight bonds as if they were the bonds of some other party than the company,—as if they had, in fact, been actually returned to the company, and as if the sale had been for the full amount of the decree. But these twenty-eight bonds had never been sold and negotiated by the company,—they were merely pledged by the company as collateral security for the payment of the company's three notes. Both were but the promises of the company,—the notes the original promises, and the bonds the collateral promises,—and upon the payment of the notes, the original promises, the bonds, the collateral promises, were discharged, and the return of the latter to the company would vest in the company no property in the bonds, their own promises. There were, in fact, no bonds returned by the bank to the company. Upon the payment of the bank debt, the bank, for its protection, to show that it had accounted for the bonds to the railroad company depositing them as collateral security, required from the president of the company a receipt for the bonds as returned back by the bank to the railroad company. It was but a formality. There were no bonds returned. They were remaining in the hands of the master, where they had been left by the bank on proving them up before him, when the decree was taken for the amount of the bonds, for "the use of the bank," and they were merged in that decree.

The sale was not for the amount of the mortgage indebtedness for which the decree was entered. The property sold but for $2000,—the amount only, as the garnishee answers, of the costs and expenses of the foreclosure, which sum was contributed and paid from the assessment of five dollars upon each bond, so that there was really no part of the decree for

the mortgage indebtedness satisfied by the sale of the mortgaged property. Besides, the decree, at its close, recited that these twenty-eight bonds, with other personal property, had been pledged for the payment of the indebtedness secured to be paid by the deed of trust to William W. Wagdin,—that indebtedness, as before observed, being the bank debt,—and then says: "All which bonds and personal property remain pledged for the indebtedness in said deed of trust to William W. Wagdin, the bonds or the judgment upon them in this suit, and said personal property, to be surrendered." As the property was to be sold subject to this Wagdin deed of trust, it was a very proper provision that these twenty-eight bonds, or the judgment upon them, which were held but as collateral security for the indebtedness in the trust deed mentioned, should be surrendered. This provision in the decree neutralized the portion of it for the payment of these twenty-eight bonds, and taking the whole decree together, there was in reality no decree for the payment of those bonds, this final provision rendering the decree as if there had been no order in it for such payment.

But it is contended further, that the property was purchased at the foreclosure sale for, and on behalf of, all the bondholders, and that if the twenty-eight bonds, or the judgment upon them, can not be followed and availed of as the property of the company, yet the company has an interest in the property bought at the foreclosure sale, as purchaser, as being one of the bondholders for and on whose behalf the property was purchased. It is true that on the proceeding for the confirmation of the report of the foreclosure sale, it appears there was introduced in evidence the affidavit of the three committeemen who were appointed to bid in the property, which stated "that the committee was appointed to buy the mortgaged property at the sale, in trust for the bondholders, with power to bid it in, to the extent of the indebtedness as found by the decree, if necessary, and expressly providing

that any purchase made by them should be in trust for the bondholders; that so far from any one expecting to get a valuable property for nothing, the property was bought for the benefit of all the bondholders, and is so held by the committee," and the report of the sale was thereupon confirmed by the court. The garnishee in his answer states that the purchase was made by the committee appointed by a part of the persons interested in the bonds; that the purchase was not made for all the bondholders, but only for such as subscribed a paper agreeing the purchase should be made by said committee, and that the interest of each purchaser should be in proportion to the bonds held by him; that these twenty-eight bonds were not represented in the purchase. This paper writing was not in evidence. One of the committee named testified on the hearing in this garnishment proceeding, that he was one of the committee to bid in the railroad for the new organization; that the committee turned the whole railroad and its property over to the new company when it was organized; that the purchase was for all that came in; that all the bondholders could come in; that these twenty-eight bonds did not come in, and some others, when they turned the property over to the new organization. It appears that nothing was done on behalf of these twenty-eight bonds, either in paying the assessment of five dollars on each bond to pay costs and expenses of foreclosure, or in coming in to the new company and taking stock therein for the amount found due upon the bonds, at one-half such amount,—the mode of formation of the new company.

If we take the *ex parte* affidavits introduced on the confirmation of the foreclosure sale as proper evidence in this case, we then have a conflict of evidence whether the purchase at that sale was for and on behalf of all the bondholders, or of only certain of the bondholders, not including the holders of these twenty-eight bonds. As on appeal from the Appellate Court we do not review any determination of con-

troverted facts, but only questions of law, in the absence of anything in the record showing what was the finding of fact, we must take it to have been in the way most favorable for the support of the decision made; and in the present case, that the property was not purchased at the foreclosure sale for and on behalf of all the bondholders, but for and on behalf of a portion of them only, of which the holders of these twenty-eight bonds, or the Galena and Southern Wisconsin Railroad Company, did not form a part.

Not perceiving from the record that at the time of the service of process on the garnishee, or since, he was indebted to such railroad company, or had any effects or estate of the company in his possession, custody or charge, or that the company itself had any property whatever, the judgment of the Appellate Court must be affirmed.

Judgment affirmed.

WILLIAM ILETT *et al.*

v.

THOMAS F. COLLINS *et al.*

Filed at Ottawa May 12, 1882.

1. VENDOR'S LIEN—*waived by taking collateral security.* The vendor of real estate, by taking collateral or other security for the purchase money, waives his lien on the property sold.

2. SAME—*lost when the debt is barred by limitation.* Where the debt for the purchase money of real estate is barred by the Statute of Limitations, no vendor's lien can exist that may be enforced.

3. LIMITATION—*when available by demurrer.* Where the fact that a debt sought to be collected is barred by the Statute of Limitations, appears on the face of the bill, advantage may be taken of the bar on demurrer.

4. PRACTICE IN CHANCERY—*setting aside dismissal of bill—how far discretionary.* On sustaining a demurrer to a bill in chancery the court below entered an order dismissing the bill. The complainant, at the same

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term of court, upon reasons assigned and supported by affidavit, moved the court to set aside the order of dismissal. The motion was denied, and upon questioning the propriety of this ruling, it was held to be within the sound discretion of the chancellor whether he will set aside such an order of dismissal, and there not appearing to have been any abuse of that discretion, the ruling was not subject to review.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

Mr. MORTON CULVER, for the plaintiffs in error:

We claim the demurrer to the first bill ought not to have been sustained. The bill alleges fraud on the part of the vendee, and although this court has not passed directly on this point, still it intimates that a lien would be good. *Conover* v. *Warren*, 1 Gilm. 502; *Manly* v. *Slason*, 21 Vt. 277; 2 Washburn on Real Prop. 91, note.

The amended bill, we think, comes directly within the rule laid down in this State, and therefore sustaining the demurrer thereto was error. *Dyer* v. *Martin*, 4 Scam. 146; *Conover* v. *Warren*, 1 Gilm. 498; *Trustees, etc.* v. *Wright*, 11 id. 603; *Same* v. *Same*, 12 id. 432; *Cowl* v. *Varnum*, 37 id. 181; *Wilson* v. *Lyon*, 51 id. 166; *Carpenter* v. *Mitchell*, 54 id. 126.

The court erred in allowing the affidavit of Patrick McHugh to be read, on motion to set aside the order of dismissal, in the face of one of its own rules that no affidavit should be read unless submitted to the opposite party; and secondly, because it is a vicious practice. *Mendell* v. *Kimball*, 85 Ill. 582.

If the bill, as amended, is good, then the court erred; and if the bill, as amended, is bad in some special point, advantage can only be taken of it, as a general rule, by special demurrer.

Mr. P. MCHUGH, for the defendants in error:

There is no conflict of authority that the vendor's lien is gone, when independent security, either of property or the responsibility of a third person, is taken by the vendor.

Conover v. *Warren et al.* 1 Gilm. 498; *Cowl* v. *Varnum*, 37 Ill. 181; *Boynton* v. *Champlin*, 42 id. 57; *Kirkham* v. *Boston*, 67 id. 599; *Andrus* v. *Coleman*, 82 id. 26.

The staleness of the alleged lien renders the bill obnoxious to a demurrer. The vendor's lien ceases when the debt, on account of which the lien is claimed, is barred by the statute. Jones on Mortgages, sec. 218; *Borst* v. *Corey*, 15 N. Y. 505; *Trotters* v. *Erwin*, 27 Miss. 772; 2 Sugden on Vendors, 391. note 7.

Where it appears on the face of the bill (as in this suit) that the cause of action set out is barred by the Statute of Limitations, the defendant may take advantage of the bar by demurrer. Story's Eq. Pl. secs. 484, 503, 571; *Hoare* v. *Peck*, 6 Simons, 51; *Foster* v. *Hudgson*, 19 Ves. 180; *Wisner* v. *Barnett et al.* 4 Wash. 631; *Caldwell* v. *Montgomery*, 8 Ga. 108.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The bill in this case was brought by William Ilett and Edward Hartwell, in the Superior Court, against Thomas F. Collins, Emelie F. Collins, and others, to establish a vendor's lien, and subject the property to the payment of the purchase money alleged to be still due and unpaid. A demurrer to the original and amended bills was sustained, and the bills dismissed. That decree, on the appeal of complainants, was affirmed in the Appellate Court for the First District, and now complainants bring the case to this court on error.

It is alleged in the original bill, that in June, 1873, complainants, in pursuance with a verbal agreement made with Thomas F. Collins, conveyed the premises to Emelie F. Collins, wife of Thomas F. Collins, in consideration of the sum of $10,000, to be paid cash in hand; but at that time Thomas F. Collins represented he did not have the cash, and that he would pay the same within ninety days, and further represented he had gas stock of the par value of $10,000, and

that he would and did deposit with complainants bonds for the same as collateral security for the purchase money of the property conveyed to his wife, and that after protracted litigation they had realized about $2000 on the gas stock, and that the balance of the purchase money remained unpaid. The prayer of the bill is, that complainants may have a vendor's lien upon the property for the sum due them, and in default of payment of the amount that should be found due, that the premises should be sold in the usual mode of proceeding in such cases.

In sustaining the demurrer to the original bill there was no error. The rule of law is definitely settled, in this State, that where the vendor, on the sale of real estate, takes collateral or other security for the purchase money, it will be regarded as a waiver of any lien for the same on the property itself. *Kirkham* v. *Boston*, 67 Ill. 599, and cases there cited. It is apparent, from the allegations of the bill, that complainants relied on the bonds for gas stock as collateral security for the purchase money of the property conveyed to Mrs. Collins. It is so alleged, and the intention is plainly manifested by efforts of complainants to collect what they could on the gas bonds. Taking such collateral security was a clear waiver by the vendors of any lien on the property for the purchase money, and when once waived it can not, of course, be re-asserted by the vendors.

In the amended bill it is alleged no security was taken for the purchase money of the property conveyed to defendants, but that it all remains due and unpaid. There is, however, a sufficient reason why the demurrer to the amended bill was properly sustained. It will be noticed the conveyance to defendants was made in June, 1873, and the bill in this case was not brought until July, 1879. No lien was reserved in the deed, nor was the purchase money evidenced by any writing. It is clear, therefore, under the law of this State, the debt itself is barred by the Statute of Limitations, and

where the debt is barred no lien can exist that can be enforced. The fact the debt is barred by the statute appearing on the face of the bill, advantage may be taken of the bar on demurrer. Story's Eq. Pl. sec. 484; *Foster* v. *Hodson*, 19 Ves. 180; *Hoare* v. *Peck*, 6 Simons, 51.

It was a matter within the sound discretion of the court whether it would set aside the order of dismissal of the bill, on the motion of complainants, made at the same term of court at which the order was made, for the reasons set forth in the affidavits filed in support of the motion. There was certainly no abuse of the discretion with which courts are clothed in such matters, and the action of the court in that regard is not subject to review in this court. But aside from this view of the law, on looking into the affidavits filed in support, as well as those against, the motion, as may be done, it appears the decision of the court was entirely proper.

The judgment of the Appellate Court must be affirmed.

Judgment affirmed.

WILLIAM WILMERTON

v.

WILLIAM N. PHILLIPS.

Filed at Ottawa May 12, 1882.

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1. REMOVING CLOUD UPON TITLE—*reimbursing purchaser at tax sale—effect of illegality of tax.* Upon bill in chancery to remove a cloud upon the title to land, the alleged cloud consisting of a tax deed, the defendant claiming under the tax deed, and who was the purchaser at the sale of the land for taxes, insisted, if his title should be set aside he ought at least to be reimbursed the amount he had paid at the tax sale. The taxes for the non-payment of which the land was sold had been assessed upon personal property in a district in which the property was not liable to the assessment, so there was no obligation on the part of the owner of the land to pay them. Hence the entire proceedings concerning the levy of the tax and the sale of the land therefor were void, and the purchaser at the tax sale was not enti-

tled to be reimbursed the amount he paid at that sale, as a condition to the granting of the relief sought by the bill.

2. Purchasers at tax sales are bound to know at their peril that the supposed delinquent is in truth and in fact a delinquent,—that he has been lawfully assessed, and has failed to make payment.

APPEAL from the Circuit Court of Mercer county; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. TALIAFERRO & CONNELL, for the appellant:

Where the owner of land seeks to have a tax title on the same set aside as a cloud on his title, he must first pay or offer to pay the amount of the sale, with interest thereon, and the subsequent taxes paid by the holder of the tax certificate or deed. *Farwell* v. *Harding*, 96 Ill. 32; *Phelps et al.* v. *Harding*, 87 id. 442.

If the personal tax was wrongfully assessed, the remedy was before the town board of review, or before the county board. Hurd's Stat. 1881, ch. 120, secs. 86, 97.

The appellee could, and ought to, have appeared before the county court on the day set for taking judgment against the land for taxes. Hurd's Stat. 1881, sec. 191.

Appellee was notified of the extension of this tax against the lot, in accordance with sec. 183 of the Revenue law, and wrote a letter to the collector absolutely refusing to pay the tax, and threatening to prosecute the collector if he sold the land for the taxes. He can not sleep upon his rights, and let all legal opportunities pass given him to correct an illegal assessment, and then claim the right to take the incumbrance off without reimbursing the purchaser for the moneys paid by him, without notice of any defect in the proceedings.

Messrs. BASSETT & WHARTON, for the appellee:

The only point seriously urged by appellant is, that the court set aside the tax deed without requiring appellee to pay him the money he had paid at the tax sale. The cases cited were all based on that of *Reed* v. *Tyler*, 56 Ill. 288.

In all these cases the land was sold for taxes due on the assessment of the land, and the titles were set aside because the proceedings to sell the land were irregular or illegal. In those cases the owner was benefited by the payment of taxes which were a lien on his land. But these cases have no application here, because the assessment here and the levy of the tax were without any foundation, and were a fraud on appellee. He had no property in the township liable to assessment, and knew nothing of the assessment until long after the warrant was issued for the collection of the taxes. Having no property in the town liable to assessment, the assessment and levy of taxes will be enjoined by the courts, without the imposition of terms. *Union Trust Co.* v. *Webber*, 86 Ill. 502; *Kimball* v. *Trust Co.* 89 id. 611; *Bank of Shawneetown* v. *Cooley*, 77 id. 622; *Supervisors* v. *Webber*, 53 id. 141.

Lee v. *Ruggles*, 52 Ill. 428, is a case precisely in point, and the court distinguishes that case from *Reed* v. *Tyler*. The same principle is sustained in *Conwell* v. *Watkins*, 71 Ill. 489; *Hodgen* v. *Gettings*, 58 id. 431; *Stout* v. *Cook*, 37 id. 285; *Forman* v. *Stickney*, 77 id. 579; *Lawrence* v. *Miller*, 86 id. 502; *Campbell* v. *McCohen*, 41 id. 45; *Conklin* v. *Foster*, 57 id. 104.

As to the judgment there was only constructive service. They did not appear and defend, and therefore are not estopped from now denying the validity of the tax and judgment. *Belleville Nail Co.* v. *Webber*, 98 Ill. 399; *Tucker* v. *Conwell*, 67 id. 552; *Flower* v. *Elwood*, 66 id. 434.

The appellant can not claim that he was an innocent purchaser. The rule of *caveat emptor* applies. *Conwell* v. *Watkins*, 71 Ill. 484.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

This is a bill to set aside a tax deed as a cloud upon the title of appellee to a tract of land situate in North Henderson township, Mercer county, this State.

The uncontroverted facts are, that the assessor of said township made a personal property assessment against Phillips, Carmichael & Co., for the year 1875, upon which a tax of $99 was levied against them. This tax not having been paid, the same was extended against the land in controversy, which belonged to appellee, who was at the time a member of the firm of Phillips, Carmichael & Co. The land was subsequently sold to satisfy this tax, appellant becoming the purchaser, who in due time received a tax deed therefor. The firm of Phillips, Carmichael & Co., at the time of the assessment and tax proceedings, was doing business in Chicago, and was composed of appellee, Thomas S. Phillips, and George S. Carmichael, appellee being a resident of Galesburg, Knox county, and the other members, of Chicago, where the partnership business was carried on. Neither the firm nor appellee, at the time of said assessment, was the owner of any personal estate or property of any description in said township, nor was said firm, or either of the members thereof, doing business there at that time, nor were they, or either of them, liable to the assessment made against them. Under these facts the circuit court of Mercer county held the tax proceedings, culminating in a tax deed to appellee's land, unauthorized and void, and thereupon entered a decree accordingly.

Appellant brings the case here by appeal, and asks a reversal, on the ground appellee did not, by his bill or otherwise, offer to reimburse appellant the amount paid by him for the land at the tax sale, and in support of this position his counsel cite *Farwell* v. *Harding*, 96 Ill. 32; *Phelps* v. *Harding*, 87 id. 442; *Barnett* v. *Cline*, 60 id. 205.

The cases relied on are not applicable to the facts in this case. Had appellee been under any legal liability or obligation to pay the tax for which the land in this case was sold, then the above authorities would be in point, but such is not the case. As we have already seen, neither the firm of Phil-

lips, Carmichael & Co., nor any of its members, were liable to a personal tax assessment in the township, hence the assessment, levy, and all proceedings relating to the matter, were and are absolutely null and void. And appellee having consequently incurred no liability with respect to the same, it would be simply a tax upon justice to deny him relief except upon the condition that he should pay a sum of money that he never owed, and which he was therefore under no legal or moral obligation to pay. Purchasers at tax sales, while availing themselves of the opportunity of obtaining highly remunerative profits on small investments, are bound to know at their peril, when purchasing at a tax sale, that the supposed delinquent is in truth and in fact a delinquent,—that he has been lawfully assessed, and has failed to make payment, etc.

The decree of the circuit court was clearly right, and will therefore be affirmed.

Decree affirmed.

Mr. JUSTICE WALKER: There is no proof that complainant was the owner of the land, and he had no right to relief unless he proved he held title. A mere stranger has no right to intermeddle with other men's titles or purchases of land for taxes.

Mr. JUSTICE SCOTT: I do not concur either in the reasoning or the conclusion of the majority opinion of the court.

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ADAM SMITH

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Ottawa May 12, 1882.

1. NEW TRIAL—*in a criminal case.* The guilt or innocence of the accused in a criminal case is always a question for the jury, and their finding will seldom be disturbed unless when it is manifest that they have been misled by the instructions of the court to the prejudice of the defendant.

Briefs of Counsel.

2. LARCENY—*possession of stolen goods as evidence of guilt.* Possession of property recently stolen is *prima facie* evidence of guilt, and is sufficient to warrant a conviction for its larceny, unless the attending circumstances or other evidence so far overcome the presumption thus raised as to create a reasonable doubt of the guilt of the accused, when an acquittal should follow.

3. INSTRUCTION—*whether it assumes facts.* On the trial of one for larceny of goods, the possession of which by the accused four days after the theft was not disputed, the court instructed the jury "that the possession of stolen property soon after the commission of the theft is *prima facie* evidence that the person in whose possession it is found is guilty of the wrongful taking, and is sufficient to warrant a conviction, unless the other evidence in the case or the surrounding circumstances are such as to raise a reasonable doubt of such guilt:" *Held*, that the instruction was proper, and not open to the objection that it assumed the existence of any fact necessary to be proven which was disputed on the trial.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

Messrs. FORREST & MAY, for the plaintiff in error:

It is error to charge the jury that the possession of property recently stolen is *prima facie* evidence of guilt. The rule is, that the possession of property recently stolen is evidence against the accused, which, like other evidence, is to be taken and considered by the jury in connection with the other testimony in the case. *Thompson* v. *State*, 43 Texas, 268; 2 Bishop's Crim. Procedure, (3d ed.) sec. 740; *State* v. *Hodge*, 50 N. H. 510; *Smith* v. *State*, 58 Ind. 340.

That such possession does not change the burden of proof to the defendant, see 2 Bishop's Crim. Procedure, sec. 743; *Stover* v. *People*, 56 N. Y. 315; *State* v. *Hodge*, 50 N. H. 517.

Mr. LUTHER LAFLIN MILLS, State's Attorney of Cook county, and Mr. GEO. C. INGHAM, Assistant State's Attorney, for the People:

Whatever may be the law in some States, it is settled, in this as well as many other States, that the recent possession

of stolen property, unexplained, is of itself *prima facie* evidence of guilt. *Comfort* v. *People*, 54 Ill. 404.

The instruction is almost in the very language of the court in the case cited.

The possession of fruits of crime recently after its commission is *prima facie* evidence of guilty possession, and if unexplained, is conclusive. This presumption applies to other crimes, such as arson, murder accompanied by robbery, etc. 1 Greenleaf on Evidence, sec. 34; *State* v. *Cassidy*, 12 Kan. 550; 1 Hawley's Am. Crim. Rep. 568; *Tucker* v. *State*, 57 Ga. 456; *Belote's case*, 36 Miss. 120; *Foster* v. *State*, 52 id. 695; *Smathers* v. *State*, 46 Ind. 450; *Crilly* v. *State*, 20 Wis. 231; *State* v. *Williams*, 54 Mo. 170; *Jones* v. *State*, 12 Ill. 259; *State* v. *Weston*, 9 Conn. 527; *State* v. *Brewster*, 7 Vt. 118; *Maynard* v. *State*, 46 Ala. 85; *Commonwealth* v. *Randall*, 119 Mass. 107; *State* v. *Merrick*, 19 Maine, 398; *State* v. *Turner*, 65 N. C. 592.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

Accused was indicted for larceny of a wagon, and on a trial had in the Criminal Court of Cook county, was found guilty, and sentenced to a term of imprisonment in the penitentiary. Evidence was introduced tending to establish facts that show his guilt, and it is not claimed that on the testimony found in the record a new trial should be awarded had there been no error in the instructions given on behalf of the prosecution calculated to mislead the jury. The guilt or innocence of the accused is always a question for the jury, and their finding will seldom be disturbed, unless where it is manifest they have been misled by the instructions of the court to the prejudice of defendant.

The instruction given on behalf of the People, the correctness of which is called in question both in the argument and on the assignment of error, is as follows:

"The court instructs the jury that the possession of stolen property soon after the commission of the theft is *prima facie* evidence that the person in whose possession it is found is guilty of the wrongful taking, and is sufficient to warrant a conviction, unless the other evidence in the case or the surrounding circumstances are such as to raise a reasonable doubt of such guilt."

There is no doubt there are contradictory decisions on this branch of the law, but in this State it is certainly settled that possession of property recently stolen is *prima facie* evidence of guilt, and is sufficient to warrant a conviction unless the attending circumstances or other evidence so far overcome the presumption thus raised as to create a reasonable doubt of the guilt of the accused, when, of course, an acquittal should follow. This principle is so definitely determined by the decision of this court in *Comfort* v. *The People*, 54 Ill. 404, it need not now be discussed as a new question.

The instruction as given states the law nearly in the precise terms it is declared by this court to be. Nor is it subject to the objection it assumes any fact to be proved that was a matter of contention at the trial. It can not be said it assumes the existence of any fact, unless it was the possession of the property recently after it was stolen. That fact was proven by the People, and the accused admitted it came to his possession within four days after it was proven to have been stolen from the owner. Even if the instruction assumes the property was found in the possession of defendant shortly after it was stolen, that fact was not in dispute, and it certainly did the accused no harm. It was fairly left to the jury to find whether the other evidence and circumstances proven either by defendant or the People, sufficiently overcame the presumption of guilt raised by proof of possession of the stolen property shortly after the theft had been committed.

The facts the evidence tends to establish show the guilt of the accused past all reasonable doubt, and as the law applicable to the facts was fairly given to the jury, there is no ground for setting aside the verdict. The judgment will be affirmed.

Judgment affirmed.

Mr. JUSTICE DICKEY: I think it error to charge a jury that any given circumstance is "sufficient to warrant a conviction." That is always a question of fact, not of law.

PETER PAPIN *et al.*

v.

ALBERT E. GOODRICH *et al.*

Filed at Ottawa May 12, 1883.

1. CONTRACT—SALE OF LAND—*as to precedent or contemporaneous acts of the vendor and purchaser, respectively.* Where a written offer to purchase real estate is accepted, the purchaser proposing to pay $35,000 in cash on or before a certain day named, and to assume the payment of a mortgage on the property, possession to be given on the cash payment, and a mortgage to be given on the premises for the deferred payments, the payment of the $35,000 must precede the right of the purchaser to receive a deed, and the execution of such deed must precede or be contemporaneous with the execution of the mortgage to secure the deferred payments.

2. SAME—*excuse for non-performance by purchaser—use of insulting language by vendor—inability of vendor to perform.* The use of insulting, disagreeable and irritating language by a vendor of real estate, when approached on the subject of the contract by the purchaser, affords no excuse for any relaxation on the part of the latter or his assignee in preparing and offering to carry out the contract. If the vendor, before the day of payment, has put it out of his power to perform his part of the contract, payment, or an offer to pay unqualifiedly, would, doubtless, be excused.

3. SAME—*failure on part of vendor to fix the time for doing an act connected with sale—as excusing tender of payment by purchaser on the day fixed therefor.* In a contract for the sale of a hotel and all the furniture belonging thereto, at a definite and fixed price, an inventory of the furniture to be furnished by the vendor, in which contract a payment is provided to be made on or before a day named, a refusal on the part of the vendor to set a time for taking the inventory affords no excuse for not making the payment at the proper time, or an unqualified tender of the same, as the taking of the inventory could have nothing to do with fixing and making more definite the duties of either party, such as determining the price, or

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amount of payments. In such case the making of the inventory is merely a separation and identification of the property, and a part of the surrendering of possession.

4. SAME—*right of purchaser to inspect deed before paying purchase money.* In the absence of any clause in a contract of purchase of property to that effect, the purchaser will have no right to a personal inspection of the vendor's deed before making the payment upon which he is to receive a conveyance.

5. SAME—*proof of custom on that subject.* There is no error in refusing proof of a custom in a particular place to afford a purchaser of land an opportunity to inspect his vendor's deed before making payment, when no offer is made to show that it was uniform, long established, generally acquiesced in, and so well known as to induce the belief that the parties contracted with reference to it.

6. SAME—*refusal of vendor to permit purchaser to inspect deed before payment—effect on the rights of the parties.* Where, by a contract, the purchaser of real estate is required on a certain day to make a payment, and the vendor to convey, the purchaser; on the day before the day fixed, offered to make the payment upon inspection of the vendor's deed, if it should prove satisfactory, and the vendor refused to allow an inspection, though stating he had the same prepared ready for delivery on payment, the court say they do not hold the vendor made a sufficient tender of a deed, or manifested such a willingness to comply with his contract as to have authorized him then, on the refusal of the purchaser to perform, to have filed a bill to cancel the contract.

7. Under a contract for the sale and conveyance of real estate, the purchaser was to make a payment on or before a day named, when the vendor was to deliver the conveyance. On the day preceding this day, the assignee of the purchaser, having the money necessary, offered to pay it, if, upon inspection of the deed, it should prove satisfactory, which inspection the vendor refused, but offered to deliver the same on deposit of the money with his banker, which the assignee refused to do: *Held*, that neither party was relieved from his obligation under the contract by what then transpired.

8. SAME—*as to furnishing abstract of title—specific reason for refusal of purchaser to perform.* Where a contract of purchase provides that the vendor is to furnish an abstract of title, and notice is given where such abstract may be found and inspected, the failure of the vendor to furnish the same, when no objection is urged at the time, will not authorize the purchaser to rescind, and his refusal to perform is placed on another ground which is untenable.

9. PRACTICE—*time to object.* Where no objection is taken in the court below to amending a bill for the specific performance of a contract for the sale of real estate, so as to seek a cancellation of the contract, it can not be urged as a ground of error in a court of review.

10. AMENDMENT—*of bill changing prayer for relief of a different kind.* There is no error in allowing an amendment of a bill by a vendor of property for the specific performance of the contract by changing the prayer for a cancellation of the contract. The defendant has no vested right in the phraseology of the bill.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. GEORGE GARDNER, Judge, presiding.

Mr. JAMES FELCH, and Mr. GEO. L. THATCHER, for the appellants:

A party, to have a specific performance of a contract, or its rescission by the court for the failure of the other party to perform, must be in no default himself. *Piper* v. *Stocker et al.* 2 Grant's Cases, 116; *Boon* v. *Missouri Iron Co.* 17 How. 343; *Doyle* v. *Teas*, 4 Scam. 265; *Stone* v. *Sprague*, 20 Barb. 509; *Bellinger* v. *Kitts*, 6 id. 274; *Henry* v. *Raiman*, 25 Pa. St. 354; *Hungate* v. *Rankin*, 20 Ill. 642; *Bourland* v. *Sicklcs*, 26 id. 498; *Clark* v. *Weis*, 87 id. 440; *Hough* v. *Rawson*, 17 id. 588; *Smith* v. *Lamb*, 26 id. 396; *State* v. *McCauley*, 15 Cal. 458.

The complainant should not have been allowed, by way of amendment, to wholly change the object of his bill, by withdrawing his offer to perform and ask for a rescission of the contract. *Shields* v. *Barrow*, 17 How. 143; *Purvill* v. *McKinley*, 9 Gratt. 1.

If a plaintiff makes a gratuitous offer by his bill, he can not afterwards withdraw it. 1 Daniell's Chancery Practice, 387.

Messrs. COOK & UPTON, for the appellees:

A vendee is not entitled to a deed until he has made payment in full, unless the contract provides otherwise. *Terry* v. *George*, 37 Miss. 539; *Doyle* v. *Teas*, 4 Scam. 203; *Headley* v. *Shaw*, 39 Ill. 354; *Robb* v. *Montgomery*, 20 Johns. 15; Sugden on Vendors, 241, note e.

It is the duty of the vendor to prepare the deed, but he is entitled to a reasonable time to do so after demand, and is not in default until called upon for it a second time. *Fuller* v. *Williams*, 7 Cow. 57; *Fuller* v. *Hubbard*, 6 id. 1; *Connelly* v. *Pierce*, 7 Wend. 129; *Wells* v. *Smith*, 2 Edw. Ch. 78.

That an amendment of a bill for a specific performance to one asking a rescission of the contract, is proper, see *Jefferson* v. *Kennard*, 77 Ill. 246.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This was a bill in chancery, by Albert E. Goodrich, against Peter Papin, David H. Keyes and Enos Slosson, to cancel a certain contract for the sale of what is known as the "Gardner House," in the city of Chicago, evidenced by the following instruments in writing:

"SOUTH FRANKLIN STREET, *Chicago, Sept. 27, '80.*

"A. E. GOODRICH, ESQ., CITY:

"*Dear Sir*—From the interviews and conferences I had with your agent, E. Slosson, Esq., and yourself, upon the negotiation for the purchase of the Gardner House property and appurtenances, of which you are the owner, I hereby make you the following proposition: To purchase said property from you for the sum of two hundred and twenty thousand ($220,000) dollars, abstracts of title to be furnished by you, and payments to be made as follows: Thirty-five thousand ($35,000) cash, on or before January 1, 1881, and to enter into possession of said property as soon as the said cash payment is made, with all appurtenances, furniture, utensils and fixtures as now exist in the house, of which an inventory to be made collectively, between our respective agents, as soon as you have accepted my proposition; said purchase subject to a first mortgage of ninety thousand ($90,000) dollars on the building and furniture of the hotel, and to be paid from the purchase money on the first of October, 1886, and bearing six per cent interest per annum; and

by taking possession of the premises on or before the first day of January, 1881, after the first cash payment of $35,000 is made. I will give, or cause to be given, a second mortgage on said building and appurtenances for the balance, one hundred thousand ($100,000) dollars, of which the payment is to be made as follows, said mortgage to be released gradually, as the payments are made: $10,000 on or before January 1, 1882; $10,000 on or before January 1, 1883; $10,000 on or before January 1, 1884; $10,000 on or before January 1, 1885; $10,000 on or before January 1, 1887; $10,000 on or before January 1, 1888; $10,000 on or before January 1, 1889; $10,000 on or before January 1, 1890; $10,000 on or before January 1, 1891; $10,000 on or before January 1, 1892. Total, $100,000, the whole bearing six per cent interest (interest payable semi-annually) on all deferred payments until paid for.

Respectfully,

PETER PAPIN.

"(Interest payable semi-annually); payments to be applied as A. E. Goodrich or assignee may direct.

A. E. GOODRICH.

"Accepted as above.

PETER PAPIN."

By the terms of this contract the payment of the $35,000 must precede the execution of a deed by Goodrich and wife to Papin, and, necessarily, the execution of that deed must precede, or be concurrent with, the execution of the mortgage by Papin to Goodrich to secure the deferred payments, for until he had title conveyed to him he could have nothing to mortgage.

We are unable to say the courts below were unwarranted by the evidence in finding that, after Papin had assigned his interest in the contract to Keyes, and about the 20th of January, 1881, complainant was ready and willing, and offered, to comply with his part of the contract, but that

Keyes then refused to carry out the contract on the other side, alleging that it was then too late. This is shown in substance by the testimony of Cook and Philo, and we are unable to say that their testimony is overcome by other evidence on the part of the defendants. The real controversy, as we understand the arguments of counsel, is, whether prior to that time Papin or Keyes had been ready and willing to carry out the contract, and offered to do so, but Goodrich was unable or unwilling, and on his part refused to do so, and thus justified the subsequent refusal on their part.

It is shown by Douglass, an attorney for Papin, that on the Wednesday next preceding the last day of December, 1880, which was, probably, the 29th of the month, he called upon Goodrich to have him set a day for the meeting of the parties to carry out or execute the provisions of the contract, but that Goodrich refused to name a day, and was insulting and denunciatory in his language. Goodrich then expressed the belief that those professing to wish to carry out the contract had no money, and said that he knew Papin was a scoundrel. However disagreeable and irritating this language of Goodrich was, it afforded no excuse for any relaxation on the part of Papin, or those wishing to occupy his place in the contract, in preparing and offering to carry out the contract. There needed no day to be fixed for the meeting of the parties to carry out or execute the contract. The contract itself provided the $35,000 in cash must be paid on or before the first day of January, 1881, and possession was to be taken after that payment was made. Until that payment was made, Goodrich had nothing to do. It is true the contract provided for the taking of an inventory of the furniture, etc., in the house, but since this had nothing to do with fixing and making more definite the duties of either party to the contract,—such as determining prices or amounts of payments,—we must presume it was only intended as a means of identification,—separating or setting apart this particular

property,—and so would, necessarily, have to be a part of the process or operation of surrendering possession of the property. It was the duty of Papin, or those representing him, when ready to carry out the contract, on or before the first of January, 1881, to go to Goodrich and make the payment, or at least offer unqualifiedly to do so. If Goodrich meanwhile had put it out of his power to carry out the contract, this would doubtless be excused, but that is not pretended here.

The proof shows that on the 31st of December, 1880, Keyes procured $35,000, which was carried to the Gardner House, and Goodrich was then notified that the money was ready to be paid to him; that Goodrich proposed that the parties should go with him to the First National Bank, and the transaction could be closed up there and the papers passed. The parties all then went to the First National Bank. Goodrich seems to have been excited, and somewhat intemperate in speech, and he expressed doubts about the other party really having the money with which to make the payment of the $35,000. He claimed to have his deed ready, and they asked to see it, but he refused. They professed to be ready and willing, and the proof shows they had with them $35,000, to make that payment, if, on inspecting his deed, it should prove to be satisfactory. He requested that they would pay the money into the hands of the cashier of the First National Bank, to whom there seems to have been no personal objection, saying that he would then deliver the deed. This they refused to do.

Had Papin, or those representing him, the right to inspect the deed of Goodrich for the property before paying the $35,000? It has been seen the contract contains no provision to that effect, and that even the execution of a deed is not expressly provided for, but is simply inferred as a conclusion of law; but that inference is also that the money is first to be paid. Until after that is done possession is not to

be given, and no legal duty arises to execute a deed. Clearly there can be no right to inspect a deed before there is a legal duty on the opposite party to have it made, and ready to be delivered.

An offer was made to prove that there was a custom in Chicago to afford purchasers an opportunity to inspect the deed before requiring them to make payment. This was properly excluded by the court. There was no offer to prove that it was uniform, long established, generally acquiesced in, and so well known as to induce the belief that the parties contracted with reference to it. *Turner* v. *Dawson et al.* 50 Ill. 85; *Packard et al.* v. *Van Schoick*, 58 id. 81. Besides, it is impossible there could be a custom to allow a party to inspect a deed at a time when there is no legal duty to have such deed made and ready to be delivered.

It is not to be understood that, under the evidence, we hold that Goodrich made a sufficient tender of a deed, or manifested such a willingness to go on and comply with his contract at that time, as to have authorized him then to have filed a bill to cancel. In that event the burden would have been upon him, and it would have then been necessary for him to have shown ability, readiness, willingness, etc., to carry out the contract. But the defendants here seek to justify a refusal subsequently to comply with the contract, on the ground that what they here did exonerated them from all further obligations in that regard, and necessarily, therefore, the burden is upon them to show that what they claim is such exoneration, is so in fact. The principle that ability and readiness to perform, and notice thereof to the opposite party, excuses actual performance or a formal tender, can have no application, because it was neither shown that Goodrich was unable to perform, nor that he excused or waived the defendant's performance. In our opinion neither party, by what transpired on the 31st of December, 1880, was relieved from his obligations under the contract. There-

after the contract stood as if nothing had been done or said at that time.

Some objection is taken that the abstract was not properly furnished or presented by Goodrich. It is sufficient to say, in that respect, no objection of that kind was urged at the time. The abstract was in the hands of Wright & Tyrrell, and held by them because they held the loan on the property of $90,000, which Papin, by the terms of the contract, was bound to pay. Keyes was notified where the abstract was, and that it could be examined there at any time. No objection was made to this, but Goodrich was notified that he declined to carry the contract out because it was then too late.

The bill, as first filed, prayed for specific performance of the contract, but by a subsequent amendment, made by leave of the court, the prayer was changed to that of cancellation of the contract. This is now urged as error. No objection of this kind was interposed in the circuit court. On the contrary, the defendants there answered the bill as amended, and tried the case without bringing forward this objection. It is now too late to urge it, even if it were, if interposed in apt time, a valid objection. But we do not see why, treating it as a question properly before us, the amendment was not properly allowed. The defendants had no vested rights in the phraseology or form of the bill. *Jefferson* v. *Kennard*, 77 Ill. 246.

We perceive no cause to disturb the decree of the circuit court. The decree of the Appellate Court is affirmed.

Decree affirmed.

Syllabus. Brief for the Plaintiff in Error.

MARGARET ENNIS

v.

LAWRENCE M. ENNIS *et al.*

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Filed at Ottawa May 12, 1882.

1. WRIT OF ERROR—*to the probate court.* A writ of error will not lie from this court to a probate court in cases where an appeal from the judgment is allowed to the circuit court.

2. APPEAL—*from probate court to circuit court.* An appeal being given from the final orders, judgments, etc., of the probate court to the circuit court, except in proceedings of administrators to sell land to pay debts, this court will not entertain a writ of error to the probate court to review an order dividing a widow's award between herself and her minor children.

WRIT OF ERROR to the Probate Court of Cook county; the Hon. JOSHUA C. KNICKERBOCKER, Judge, presiding.

Messrs. M. A. ROREE & SON, for the plaintiff in error, on the question of jurisdiction, made the following points:

The writ of error in this case will lie as a common law writ of error, and under the constitution. None could be issued out of the Appellate Court. *Haines* v. *People*, 97 Ill. 161; *Hall* v. *Thode*, 75 id. 173; *Peak* v. *People*, 76 id. 289; *Village of Hyde Park* v. *Dunham*, 85 id. 569; *Stuart* v. *People*, 3 Scam. 395; *Story* v. *People*, 79 Ill. 45. See, also, *Unknown Heirs of Langworthy* v. *Baker*, 23 Ill. 484; *Fitzpatrick* v. *City of Joliet*, 87 id. 58.

No appeal is allowed from the decision of the probate court illegally apportioning a widow's award, to the circuit court. Probate Court act, Hurd's Stat. 1881, p. 353, sec. 11; *Lill* v. *Brant*, 1 Bradw. 266; *Haines* v. *People*, 97 Ill. 162; *Peak* v. *People*, 71 id. 278; *Shirk* v. *Trainer*, 20 id. 301; *Beesman* v. *City of Peoria*, 16 id. 484; *Williams* v. *Bladenship*, 12 id. 122; *Gunn* v. *Rogers*, 4 Gilm. 131; *Allen* v. *Belcher*, 3 id. 594.

No appeal could have been taken under section 68 of the Administration act, as that relates to cases of claims allowed or rejected, and applies only to county courts.

The writ of error could not have been sued out of the Appellate Court. Art. 6, sec. 11, relating to Appellate Courts, contains no provision in regard to appeals or writs of error to or from the Appellate Courts, to or from the probate court.

It follows that when the probate court exceeds its jurisdiction, and enters a final order depriving a person of property rights, and no mode of appeal exists, as in this case, a writ of error lies, by virtue of the constitution and the common law, from this court. *Haines* v. *People*, 97 Ill. 172; *Hall* v. *Thode*, 75 id. 173.

Mr. LAWRENCE M. ENNIS, and Mr. FRANK W. WALKER, for the defendants in error:

The writ of error will not lie, an appeal to the circuit court being allowed by statute from the orders complained of. *Haines* v. *People*, 97 Ill. 161; *Holden* v. *Herkimer*, 53 id. 258; *Hobson et al.* v. *Paine et al.* 40 id. 25; Rev. Stat. chap. 37, sec. 226.

The Supreme Court has no jurisdiction even though the writ would lie, as the question is in neither a criminal proceeding, nor does it involve a franchise, a freehold, or the validity of a statute. *Young et al.* v. *Sturges*, 91 Ill. 221; *Gross* v. *People*, 95 id. 366; *Schissler* v. *People*, 93 id. 472; *Holtz* v. *People*, 92 id. 426; *Meeks* v. *Leach*, 91 id. 323; *Fleischman* v. *Walker*, 91 id. 320.

If the judge (as claimed by plaintiff in error) acted in a summary manner, or had no jurisdiction, a writ of error will not lie, but a *certiorari* is the proper remedy. *Haines* v. *People, supra; Wilkinson* v. *People*, 13 Ill. 660; *Chicago and Rock Island R. R. Co.* v. *Fell*, 22 id. 333; *Chicago and Rock Island R. R. Co.* v. *Whipple*, 22 id. 105.

Syllabus.

Per CURIAM: The writ of error in this case must be dismissed. It is sued out to the probate court of Cook county, the error assigned being in the division by the probate court of the "widow's award" between herself and her minor children.

Section 11 of the Probate Court act, Laws 1877, p. 81, provides that "appeals may be taken from the final orders, judgments and decrees of the probate courts to the circuit courts of their respective counties, in all matters except in proceedings on the application of executors, administrators and guardians for the sale of real estate," etc. It has been frequently decided that a writ of error will not lie from this court in cases where an appeal from the judgment is allowed to the circuit court. *Hobson* v. *Paine*, 40 Ill. 25; *Holden* v. *Herkimer*, 53 id. 258; *Haines* v. *People*, 97 id. 161.

Said section 11 gave an appeal in this case to the circuit court, and an appeal should have been taken to that court.

Writ of error dismissed.

GIDEON IVES

v.

WILLIAM MCHARD.

Filed at Ottawa May 12, 1882.

1. APPEAL *from Appellate Court—reviewing the facts.* Where the facts are found by the Appellate Court, in a suit upon a guaranty of a note, this court is precluded from their consideration further than to determine whether the law has been properly applied to them.

2. VARIANCE—*where evidence tends to prove allegations.* Where several things are averred as forming the consideration of a guaranty, if there is evidence tending to prove each one, there is no variance.

3. SAME—*only material averments need be proved.* The plaintiff is only required to prove the material allegations of his declaration. If two consid-

erations for the contract are alleged, one good and the other immaterial, as forming none, the plaintiff will only be required to prove the one which is sufficient.

4. CONSIDERATION—*one good one is sufficient.* Where various considerations are averred and proved, some good and some insufficient, one sufficient one will support the contract.

5. SAME—*extension of time of payment for guaranty.* The extension of the time of payment of an antecedent debt, is a sufficient consideration to support a contract guarantying its payment.

6. PRACTICE IN SUPREME COURT—*party controverting his own proposition.* Where a party asks and obtains instructions that an agreement not to collect more than legal interest on a note forms no sufficient consideration for a guaranty of its payment, he will not, on appeal or error, be allowed to controvert such proposition.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Mercer county; the Hon. JOHN J. GLENN, Judge, presiding.

This was an action on a guaranty of the payment of a promissory note.

Messrs. BASSETT & WHARTON, for the appellant:

The allegations and proofs must agree. The consideration of the guaranty was alleged to be an agreement to extend the time of the payment of this and another note. The proof of only one of these considerations was not sufficient. 1 Chitty's Pleadings, 298; 1 Greenleaf on Evidence, secs. 66, 68; *Stone* v. *White*, 8 Gray, 594; *Mastin* v. *Toncray*, 2 Scam. 216; *Indianapolis, Bloomington and Western R. R. Co.* v. *Rhodes*, 76 Ill. 288; *Lloyd* v. *Karnes*, 45 id. 69; *Mosier* v. *Norton*, 83 id. 521; *Toledo, Wabash and Western Ry. Co.* v. *Morgan*, 72 id. 155; *Snell* v. *Deland*, 43 id. 323; *Murray et al.* v. *Haverty et al.* 70 id. 318; *Chicago and Alton R. R. Co.* v. *Mitchell*, 83 id. 429; *Menifee* v. *Higgins*, 57 id. 50; *Lincoln* v. *Stowell*, 62 id. 84.

The common counts will not help the plaintiffs, because an action on a guaranty is always upon a special contract

for a consideration that must be averred. *Stone* v. *White*, 8 Gray, 593.

Messrs. PEPPER & WILSON, for the appellee:

If one or more considerations which are recited as the ground of a promise be only frivolous and insufficient, and others are good and sufficient, then the consideration may be severed, and those that are void or frivolous disregarded, while those that are valid will sustain the promise. 2 Parsons on Contracts, chap. 1, sec. 11; *Stone* v. *White*, 8 Gray, 58 ~~1850~~; *Matthews* v. *Mick et al.* 2 Ohio St. 519; *Thomas* v. *Miles*, 3 id. 274; *Doty* v. *Knox Co. Bank*, 16 id. 133; *Weder* v. *Webb*, 20 id. 431; *Rogers* v. *Kneeland*, 10 Wend. 253; *Rice* v. *Almy*, 32 Conn. 305.

Mr. JUSTICE WALKER delivered the opinion of the Court:

The facts being found by the Appellate Court, we are precluded from their consideration further than to determine whether the law has been properly applied to them. It is claimed that there was a material variance between the averments in the declaration and the evidence. It is insisted that there were three things averred as a consideration upon which appellant guaranteed the payment of the note: First, that time of payment was extended on the Dennison note; second, an extension on the Ives and Dennison note; and that only legal interest should be collected on the Ives and Dennison note. On an examination of the evidence, we are satisfied it tended to prove all three of these averments of the consideration for the guaranty. We are, therefore, unable to see there was a variance.

It is next urged that the instructions are faulty in failing to instruct the jury that all of these were required to be proved. The rule is, that if various considerations are averred and proved, some good and some insufficient, one sufficient consideration will support the contract. The exten-

sion of time for the payment of an antecedent debt is held a sufficient consideration to support a contract. The extension of time on the Dennison note was all that was required, as that was the note the payment of which was guaranteed by appellant, and appellees' instructions announce this rule. But it is insisted that the instructions are faulty because they omit the requirement of proof of the extension of time on the Ives and Dennison note, and that it was agreed that only legal interest should be collected on it.

Appellant, in his instructions which were given, claimed that an agreement to extend the time for paying the Ives and Dennison note was not a sufficient consideration to support the guaranty, and that under the law only legal interest could be collected on that note. An agreement not to collect more than legal interest formed no consideration to support the guaranty by appellant to pay the Dennison note, and if his propositions are true, and he will not be permitted now to controvert them, appellee was not bound to prove illegal or insufficient considerations. According to appellant's theory, the only material consideration averred was the extension of the time for payment of the Dennison note. The jury were, by appellees' instructions, required to find that averment proven. The jury are only required to find that the material averments are proven, and it was not error to so instruct them. We are, therefore, of opinion that there was evidence on which to base the instructions, and that there was no error in giving them.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

Syllabus.

JOHN FISHER

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Ottawa May 17, 1882.

1. EVIDENCE—CRIMINAL LAW—*sufficiency of proof of sale of liquor.* On the trial of one for selling liquor without a license, the testimony of a witness that the defendant at a certain time kept a billiard hall in the place, and sold cider, pop and cigars, but that he did not know whether the defendant sold liquor or not, fails to show any violation of law.

2. SAME—*sale of liquor by another—proprietorship of defendant to be shown.* The testimony of a witness that at certain times he bought liquor at the defendant's place from one S. while the defendant was absent, without any proof that the defendant was the proprietor of the establishment at the time, will not authorize the conviction of the defendant for such sales.

3. SAME—*of evidence to show the time of an occurrence by one who had heard of it.* A witness testified that he had obtained liquor from the defendant several times in the summer and fall of 1878, which was within the period of limitation, and on cross-examination admitted he had had a difficulty at the defendant's place of business, and that defendant ordered him out of his house, but could not exactly remember in what year that occurred, but thought it was in 1876. The defendant called a witness who testified that he knew the former witness, and heard something about he and defendant having a difficulty. This being objected to, the defendant's counsel said: "We propose to show that in the spring of 1877" defendant and the former witness "had a difficulty, and then go further, and show that he was not in defendant's place of business after that." The court, on objection, refused to allow the same to be proven: *Held*, that the court erred in refusing this evidence, as it tended to show that sales were not made within eighteen months before the indictment.

4. SAME—*to fix date of a transaction.* It is a well known rule of evidence, that as a means of fixing the date of a given transaction, it may be proven by a witness that at a given time he heard of the occurrence.

5. NEW TRIAL—*newly discovered evidence.* A defendant convicted of selling liquor, on the testimony of a witness showing such sale in 1878, moved for a new trial, the motion being based upon his affidavit that since the trial he had a conversation with the witness, who told affiant that he was mistaken as to the year of the sales, and that he had not bought any liquor of affiant since the early part of the spring of 1877, any sale prior to that time being barred, and that such witness would so testify on a new trial. The affidavit of the witness was not produced, but its absence was satisfactorily

accounted for, and an offer to procure the same was made, if the court would withhold its decision to a later day, which the court refused to do, and denied the motion: *Held*, that the court should have given further time, or have granted the motion for a new trial.

WRIT OF ERROR to the Appellate Court for the Second District;—heard in that court on writ of error to the Circuit Court of Iroquois County; the Hon. FRANKLIN BLADES, Judge, presiding.

MESSRS. RUBENS & HIESTAND, and Mr. THOMAS W. D. CRANE, for the plaintiff in error, reviewed the evidence at some length to show that it failed to sustain the verdict.

Proof of the sale of beer is not sufficient. The statute relates only to intoxicating liquor, and whether the liquor is such is a question of fact to be proved. *State* v. *Starr*, 67 Maine, 242; *Commonwealth* v. *Chappell*, 116 Mass. 7; *Lathrop* v. *State*, 50 Ind. 555; *People* v. *Ziegler*, 6 Park. C. R. 355; *Klare* v. *State*, 43 Ind. 483; *State* v. *Bloss*, 116 Mass. 56.

The court can not take judicial notice that the kind of beer sold is intoxicating. This must be proven before a conviction is had for its sale. *Klare* v. *State*, 43 Ind. 483; *Lathrop* v. *State*, 50 id. 555; *State* v. *Chappell*, 116 Mass. 7; *State* v. *Boss*, id. 56; *State* v. *Starr*, 67 Maine, 242; *State* v. *Wall*, 34 id. 165.

The death of the sole counsel for a prisoner shortly prior to the term of the court, was a sufficient reason at least for granting time to procure the affidavit of the witness on the motion for a new trial, and when sufficient reason is shown for the non-production of the affidavit of the witness, the party's own affidavit is entitled to consideration. *Suggs* v. *Anderson*, 12 Ga. 461; *Welsh* v. *State*, 11 Texas, 368.

Although the rules for the granting of new trials are substantially the same in criminal as in civil cases, still the courts hold that new trials should be more freely awarded in criminal cases than in civil. *State* v. *Tomlinson*, 2 Iowa, 401; *State* v. *Hammond*, 5 Strob. 91; *Phipps* v. *State*, 3 Cold. 344.

And in criminal cases the more freely in proportion to the gravity of the punishment. *Falk* v. *People*, 42 Ill. 331; *Quarles* v. *State*, 1 Sneed, 407; *Troxdale* v. *State*, 9 Humph. 411.

Mr. JAMES MCCARTNEY, Attorney General, for the People:

The finding of the Appellate Court as to the facts is final and conclusive. *Tenney* v. *Foote*, 95 Ill. 99.

The plaintiff in error, by the use of due diligence, might have developed the facts on the trial which were urged for a new trial, and the affidavit of the witness should have been produced.

Counsel also commented upon the evidence, contending that it justified the verdict.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court:

This was an indictment, in the circuit court of Iroquois county, against John Fisher, for selling liquor without a license. The indictment contained nineteen counts, and was returned into court by the grand jury November 9, 1878. At the November term, 1880, a trial was had before a jury, which resulted in a verdict of guilty on ten counts of the indictment. The court entered a fine of $500 against the defendant, and sentenced him to two hundred and fifty days' imprisonment in the county jail.

On the trial of the cause four witnesses were called by the People. First, Daniel Gress. He states that the defendant, in the summer and fall of 1878, kept a billiard hall in Loda, and sold cider, pop and cigars, but he don't know whether the defendant sold liquor or not. Fritz Reineke was the next witness, and he has no knowledge of any sale of liquor by the defendant. The next witness was Theo. J. Foster. He testified that in 1877 or 1878 he had liquor at the defendant's place from one Stewart, while the defendant was absent in Pennsylvania. As to the first two witnesses, it can not be

seriously claimed that any violation of law was proved by their evidence. As to Foster's evidence, he says he purchased liquor of Stewart, but whether it was more or less than eighteen months before the finding of the indictment is uncertain, hence can not be relied upon to sustain a conviction. Besides, it was not shown that the defendant was the proprietor of the establishment at the time. If he was not, of course he could not be held liable for a sale made by Stewart. There was, therefore, no evidence before the jury upon which a conviction could be claimed, except that of Martin Ryan, who was the fourth witness for the People. He testified that he purchased liquor of defendant in the fall and summer of 1878, as many as six times,—that he purchased beer as many as six times. On cross-examination this witness admitted that he and the defendant had a difficulty at defendant's place of business, and that Fisher ordered him out of his house, but he says, "don't exactly remember what year it was." Later in his evidence he thinks it was in 1876.

After the People had closed their evidence the defendant called a witness, who testified that he knew Ryan; heard something about he and Fisher having a difficulty. This evidence being objected to, the defendant then offered to prove the following: "We propose to show that in the spring of 1877 Fisher and Ryan had a difficulty, and then go further and show that he was not in Fisher's place of business after that." This testimony was objected to by the attorney for the People, and the objection sustained by the court. When Ryan was on the stand he admitted that he had at one time a difficulty with Fisher, and that he had been ordered out of his place of business, but he did not remember when it occurred. Now, if this difficulty took place in the spring of 1877, and the witness was not in the defendant's place after that, he was doubtless mistaken when he testified that he purchased liquor in defendant's place in 1878, and this was

an important fact for the defendant to establish, and we perceive no objection whatever to the offered evidence. Indeed, it was error to reject the offered evidence. If the defendant had been able to prove that the difficulty took place in 1877, and that Ryan was not in his house after that time, as he offered to do, the jury could not, under the evidence, without disregarding its legitimate bearing, return a verdict of guilty. If this offered evidence was true, then no sale occurred within eighteen months prior to the finding of the indictment. We think it is plain that the rejection of this offered evidence prevented defendant from having a fair trial.

It may, however, be said that the remarks of the court, after the rejection of the offered evidence, may be regarded as a retraction of the ruling first made; but the ruling to which the court allowed an exception is entirely inconsistent with the remarks afterwards made by the judge. Even if the remarks be regarded as a retraction of the former ruling, still the defendant was denied a means of making out his defence. The fact that the witness and defendant had a difficulty, would be of no significance in such connection unless the date of the difficulty could be established. It is a well known rule of evidence that as a means of fixing the date of any given transaction, you may prove by a witness that at a given time he heard of the occurrence. The question asked was an appropriate mode of approaching that subject, and should have been permitted.

On the motion for a new trial the defendant read his own affidavit, in which he, in substance, stated that since the trial he had a conversation with the witness Martin Ryan, who told affiant that he was mistaken in regard to the time he testified that he bought liquor of affiant; that Ryan informed affiant that he did not obtain liquor of him at his place after the early part of the spring of 1877; that if a new trial is granted Ryan will appear and testify to such fact. The affidavit of the witness was not produced, but the defendant accounts for its

non-production in a satisfactory manner, and offered to produce it within a reasonable time, if the court would withhold its decision on the motion to a later day of the term. The court, however, refused to grant the request, and overruled the motion for a new trial. We are of opinion that it was the duty of the court either to have allowed the motion for a new trial, or postponed the hearing of the motion until the defendant had a reasonable time to produce Ryan's affidavit. The defendant could not, under the indictment, be convicted of any sale of liquor made prior to May 9, 1877, and if it be true, as the defendant showed in his affidavit, that Ryan had become satisfied that he had made a mistake, and had not purchased liquor of defendant in 1878, then the conviction, which was based solely on the evidence of Ryan, ought not to stand. It is no doubt the general rule, and a good one, that before a new trial should be granted upon newly discovered evidence, the affidavit of the witness who will testify must be produced, that the court may know that such witness will, upon another trial, testify as the party represents. But under the circumstances of this case it is plain that the defendant ought to have had an opportunity to produce the affidavit of Ryan.

After a careful examination of the whole record, we do not think the defendant has had such a trial as the law contemplates he should have, and for the error indicated the judgment will be reversed and the cause remanded.

Judgment reversed.

Mr. JUSTICE SCOTT, dissenting:

At the November term, 1878, of the circuit court of Iroquois county, defendant was indicted for unlawfully selling intoxicating liquors in a less quantity than one gallon, not having a legal license to keep a "dram-shop." On the trial before a jury defendant was found guilty on ten counts contained in the indictment. The sentence of the court was, he should pay a fine of $50 on each count on which he was found

guilty, and in addition to the fine imposed the court sentenced him to a term of imprisonment in the county jail of twenty-five days on each count on which he was convicted. That judgment was affirmed by the Appellate Court for the Second District, and defendant brings the case to this court on error.

One ground relied on for a reversal of the judgment is, that the verdict is not supported by the evidence. On this point counsel for the People insist the finding of the facts by the circuit and Appellate courts is conclusive on this court, and as the statute declares no assignment of error shall be allowed which shall call in question the determination of the inferior or Appellate Court upon controverted questions of fact in any case, excepting those enumerated in section 88 of the Practice act, this court is forbidden to pass upon the error assigned that challenges the correctness of the finding of the facts by the Appellate Court. Conceding, as may be done, that under the Practice act the Supreme Court may still review the evidence to ascertain whether the accused is guilty or not, in cases of misdemeanor that may come to this court from any of the Appellate Courts, as was done before the amendment of section 88 by the act of 1879, I think the judgment may and ought to be affirmed, on the testimony of the witness Ryan alone, if all other testimony introduced by the prosecution should be disregarded. It may be his testimony was somewhat contradictory, but his credibility was a question for the jury trying the case.

Giving credit to the testimony of Ryan, as was the province of the jury to do, the sales of whisky and beer testified to by him would fully sustain the conviction on ten counts. The witness distinctly testified as to the sales of beer, but it is objected it was not proved what kind of beer it was,—whether it was malt beer or some fermented liquors called beer, the sale of which is not prohibited by law. If the beer the sales of which were proved, was malt beer, its sale is prohibited by statute, and would justify the conviction. No

doubt the jury understood the witness when he stated he had bought *beer* of defendant, to use the word in the sense it is most commonly used, to mean a malt liquor, the sale of which is forbidden by law. It seems to me the jury might very properly understand the witness when he used the word *beer* to mean the malt liquor so generally used as a beverage. Defendant knew what kind of beer he had sold, and had he understood the witness to mean any kind of beer made by fermentation the sale of which is not unlawful, it seems certain defendant would have had him explain his meaning. It may, therefore, be reasonably concluded that both the jury and defendant understood the witness, in speaking of beer, to mean a malt liquor.

No error is perceived in the action of the court in the rejection of evidence offered by defendant. The witness produced was permitted to state he had heard there had been a difficulty between the witness Ryan and defendant, but when asked from whom he heard it, the court sustained an objection to the question. In that there was clearly no error. It was a matter of no consequence from whom he heard of the difficulty. The fact there had been a difficulty between them was all that was important, and that the witness was permitted to and did state. Counsel for defendant then said to the court: "We propose to show that in the spring of 1877 Fisher and Ryan had a difficulty, and then to go further and show that he was not in Fisher's place of business after that." Objection was made to the giving of the testimony proposed to be given, which was sustained, but the court *immediately* thereafter stated what defendant might prove, as follows: "I do not hold that you can not show the date or time that Fisher had a difficulty with the witness Ryan, and that the witness Ryan was not in Fisher's place of business after that. I only hold that what you state is no reason why this witness should be allowed to state who he heard tell that the witness Ryan and Fisher had a difficulty, and you may

show that after that time he was not in Fisher's place of business." Even if it be conceded it was improper to sustain the objection to the testimony proposed to be given, the court *immediately, instantly* thereafter, corrected its mistake, and stated clearly and distinctly that defendant might give the *very testimony* proposed to be given, and yet defendant did not avail of the permission given by the court to introduce the testimony which he claimed to be able to do. Certainly it is not error if the court inadvertently rejected proper evidence if the court instantly corrects its mistake, and grants permission to introduce the testimony proposed to be given. It would seem to be sufficient if the court at any time during the progress of the trial corrected its error, but when it is done *instantly*, as was done in this case, before any other proceedings were had, I do not understand how it is possible to hold the defendant was prejudiced in the slightest possible degree by the decision of the court.

Nor was there any error in the action of the court in overruling the motion for a new trial on the ground of newly discovered evidence. It is stated in the affidavit on which the motion is based, that defendant had a conversation with the witness Ryan, in which the witness stated to defendant he was mistaken in regard to the time when he testified he bought intoxicating liquors of defendant, and that he did not obtain any after a settlement between witness and defendant, early in the spring of 1877. Some excuse—but not a very satisfactory one—is given for not obtaining the affidavit of Ryan to the truth of the statement contained in the affidavit on which the motion is based, but defendant himself does not even state that what he expects the witness Ryan would swear to on another trial would be the truth, and the court very properly disregarded his affidavit in toto.

I am of opinion the judgment should be affirmed.

Mr. JUSTICE SHELDON concurs in the dissenting opinion.

Syllabus.

PETER BARR

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

103 110
121 644

Filed at Ottawa May 12, 1882.

1. CHANGE OF VENUE—*in criminal case, may be to county court.* A change of venue, in a case of misdemeanor, on account of the prejudice of the circuit judge, may properly be granted to the county court of the same county, if that court has jurisdiction of the offence charged in the indictment.

2. SAME—*statute relating to, construed.* The amendatory act of 1881, relating to change of venue on account of the prejudice of the circuit judge, providing that upon the filing of the proper petition and affidavits, the cause, by operation of law, *may* be tried by any other of the circuit judges of the circuit, does not, in express terms, or by implication, repeal the provision of section 19 of the Revised Statutes of 1874, relating to the same subject, which provides that the venue may be changed to some other court of competent jurisdiction in the same county, as both may well stand together.

3. STATUTE—*repeal by implication.* A later statute will not be held to repeal a former one by implication, when the repugnancy between the provisions of the two is not such that they can not both stand together.

4. COUNTY COURT—*jurisdiction of indictment for misdemeanor.* The county court has jurisdiction to try an indictment for selling spirituous liquor to a minor without having the written consent of his parents, etc., when sent to it by the circuit court in pursuance of an application for a change of venue on account of the prejudice of the circuit judge.

5. JURY—*mode of summoning in county court.* The county court is authorized by statute, when a jury has not been drawn and summoned as required in the circuit court, on the first day of the term, after ascertaining what cases are to be tried by jury, to have a *venire* issued for twelve jurors, or less, by agreement of the parties, who shall be summoned by the sheriff from the body of the county to serve as jurors for each trial had during the term. The order for such jury to serve during the term, instead of the particular case in which one is demanded, is not error.

WRIT OF ERROR to the Appellate Court for the Second District;—heard in that court on writ of error to the County Court of Will county; the Hon. BENJAMIN OLIN, Judge, presiding.

Statement of the case.

The plaintiff in error was, at the May term, 1880, of the Will county circuit court, indicted for selling intoxicating liquor to a minor without first having the written consent of his parents, guardian, or family physician. After the return of the indictment, and entering a plea of not guilty, the defendant, upon the proper petition and affidavits, moved the court for a change of venue, because of the alleged prejudice of the circuit judge then presiding, whereupon the court ordered that the venue of the cause be changed according to the prayer of the petition, and ordered that the cause be certified to the county court of Will county for process and trial. The order last named was obeyed by the clerk of the circuit court, and the cause was docketed in the county court of Will county for trial at the July term, 1880, of that court. At that term the defendant moved that court to strike the case from the docket, for the reason that the county court did not have jurisdiction of the case, which motion the court overruled, and the defendant excepted. Afterward, when the jury that tried the case was called by the clerk, the defendant challenged the array of the jury, and also moved the court to quash the *venire* by virtue of which they were summoned, both which motions the court denied, and defendant excepted. The trial resulted in a verdict finding the defendant guilty, as charged in the second count of the indictment. A motion for a new trial was made and overruled, to which exception was taken, and judgment was entered on the verdict, which, on appeal to the Appellate Court for the Second District, was affirmed, and the case brought here on writ of error.

Messrs. HALEY & O'DONNELL, for the plaintiff in error.

Mr. JAMES MCCARTNEY, Attorney General, for the People.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The points relied upon for the reversal of the judgment are, the ordering by the circuit court that the cause be certified to the county court of Will county for trial, the refusal to quash the *venire*, and the insufficiency of the evidence to support the verdict.

As the prayer of the petition for a change of venue was that the venue be changed according to law, and the circuit court ordered that the venue of the cause be changed according to the prayer of the petition, and there was at the time a statute in force providing that when the cause for a change of venue is the prejudice of the judge, and there were the proper petition and affidavits, "thereupon the case may be tried by any other of the circuit judges of the circuit in which the case is pending to whom the cause alleged does not apply," it is argued that upon the filing of the proper petition and affidavits, the cause then, by operation of law, stood transferred to some other judge of the circuit, and the judge from whom the change of venue was asked had no jurisdiction afterward to change the venue to the county court. This is a too straitened construction of the statute. The Revised Statute in relation to the change of venue, of July 1, 1874, provided that when a change of venue is granted, it may be to some other court of competent jurisdiction in the same county to which there is no valid objection. (Rev. Stat. 1874, p. 1095, sec. 19.) We understand that provision of this 19th section to be still in force, and not repealed by the later statute above referred to, providing that in case of such an application, because of the prejudice of the judge, the case may be tried by any other of the circuit judges of the circuit to whom the cause alleged does not apply. This later act has no repealing clause, and so does not expressly repeal any provision of the statute of 1874, and does not do so by implication, unless, according to the well known rule, there

is such a repugnancy between the provisions of the two statutes that they can not stand together. The later statute does not say the case *shall*, but that it *may*, be tried by any other of the circuit judges of the circuit. This is not inconsistent with the power under the former statute to change the venue to the county court of the county, and the two statutes in this respect may well stand together.

Even before the statute of 1874, changes of venue to courts of the same county, against which no valid objection existed, were authorized. In the case of *Curran* v. *Beach*, 20 Ill. 259, this court sustained a change of venue granted from the judge of the Cook county circuit court to the common pleas court of Cook county.

Further, by section 120, ch. 37, Rev. Stat. 1874, p. 344, it is provided that when the grand jury of the circuit court shall indict for offences cognizable in the county court, such indictments may, in the discretion of said circuit court, be certified under the seal thereof to the county court for process and trial, etc. The offence in question was one cognizable in the county court, though the mode of commencing the prosecution there is by information instead of by indictment.

We are of opinion there was full power in the circuit court to order the change of the venue of the cause, as it did, to the county court, and that the latter court had jurisdiction to try the same.

At the July term of the county court, at which the defendant was tried, the court made the following order for a jury: "It is ordered by the court that the clerk issue a *venire facias*, directed to the sheriff of said county, commanding him to summon twelve good and lawful men of said county to serve as jurors during the present term of court, or until discharged, returnable on Monday, the 19th day of July, A. D. 1880, at 10 o'clock A. M." It is insisted the motions in challenge of the array of the jury, and to quash the *venire*, should have

been sustained, because the county court had no right to summon a jury in that manner.

The eighth section of chapter 78, Rev. Stat. 1874, p. 631, provides in what manner jurors shall be selected and summoned for the term of the circuit court, and section 110, of chapter 37, Rev. Stat. 1874, p. 342, provides that unless the court shall otherwise order (as was not done in this case), the jury for the law terms of the county court shall be drawn and summoned in the same manner as juries are drawn and summoned for the circuit court. This jury was not drawn and summoned in that manner, as is contended it should have been. But said section 110 provides further another manner of getting a jury for the county court, when a jury is not summoned as above provided, which is by the court, on the first day of each term, calling all the cases for trial on the docket, to ascertain what cases are to be tried by a jury; and if a jury shall be demanded by either party to any one case on the docket of the county court, the judge may direct the clerk of the county court to issue a *venire* for twelve jurors, unless the parties to the case shall consent to have the case tried by a less number of jurors, and the sheriff shall then summon such jurors from the body of the county to serve as jurors for such trial, and then the court may retain such jury so summoned to try all jury cases which are for trial at that term. For anything that appears in the record, the jury were summoned in conformity with this provision of section 110, and the presumption that the jury were so summoned will be indulged in support of the action of the court.

It is objected that there should not be this presumption here, for the reason that it appears the action of the court was not in pursuance of this provision, in that the *venire* was not issued or ordered to be issued in and for any particular case, and that the order of the court and the *venire* show that it was a general order of court for twelve men to serve as jurors for the term, without reference to any case. As the

provision is that the jurors summoned to serve as jurors for the trial of the particular case in which a jury is demanded, may be retained by the court as a jury to try all jury cases which are for trial at the term, the legal effect is, that a jury ordered and summoned in compliance with this provision of the statute is a jury to serve during the term, if such be the pleasure of the court; so that the ordering and summoning of the jury to serve during the term, instead of in the particular case in which a jury is demanded, is but expressing the legal effect of summoning a jury in the latter mode, and the distinction is but one of form. We find nothing substantial in the objection to the jury.

Upon perusal of the testimony, we see no reason for disturbing the verdict of the jury on the ground that it was not supported by the evidence.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

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103 115
54a 178

SAMUEL P. PARMLY

v.

LUCY M. BUCKLEY *et al.*

Filed at Ottawa May 12, 1882.

1. RESCISSION OF CONTRACT—*rights of parties—and what amounts to a rescission.* The parties to a contract for the sale of real estate have the right, if they see proper, to cancel and set aside the same; and when the purchaser notifies the vendor, in writing, that he considers himself released from all obligation under the contract, and the vendor immediately gives the vendee notice that he accepts the surrender of the contract, and declares the contract at an end, this will be a valid rescission of the contract of sale, after which no specific performance can be had.

2. AGENCY—*corporation bound by acts of its attorney.* Where notice of the revocation of a contract with a corporation is prepared and served upon the other party by an attorney of the company, with the knowledge and con-

sent of its manager, the company and its manager will be bound by the act of the attorney, and not be allowed to dispute the attorney's authority.

3. SERVICE OF NOTICE—*on corporation.* Notice of the acceptance of a cancellation of a contract served upon a private corporation by leaving the same at the company's business office with a person acting as its agent, and at the time in charge of its business, is a good service as to the company.

4. ASSIGNMENT—*assignee of contract of purchase takes subject to its infirmities.* The assignee of a contract for the purchase of land takes it subject to its infirmities, and acquires no greater rights than the assignor had, and if the assignor has rescinded the contract so as to prevent him from demanding a specific performance, the assignee will also be precluded from enforcing its performance.

APPEAL from the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

Mr. WALLACE HECKMAN, for the appellant:

There is no power to forfeit unless complainant has been ready and willing at all times to convey according to the terms of the contract. *Peck* v. *Brighton Company*, 69 Ill. 200; *Bishop* v. *Newton*, 20 id. 178; *Brown* v. *Cannon*, 5 Gilm. 174; *Baker* v. *Bishop*, 45 Ill. 270; *Brown* v. *Beech*, 46 id. 311.

A vendor can not rescind without tendering deed according to the contract, and returning or tendering back payments. *Murphy* v. *Lockwood*, 21 Ill. 611.

An agreement subsequent to the execution of a contract founded on no consideration, is not binding, and will not avail to prevent a specific performance of the original contract. *Merkle* v. *Wehrheim*, 32 Ill. 534.

The contract of purchase being of record July 30, 1880, any such correspondence between the vendors and vendee will not avail against Parmly, an innocent purchaser for full value, without notice thereof. *Cowan* v. *Loomis*, 91 Ill. 132.

The doctrine is now well settled that courts will recognize and protect the rights of an assignee of a chose in action, whether the assignment be good at law or in equity only. *Chapman* v. *Shattuck*, 3 Gilm. 52; *Stewart* v. *Metcalf*, 68 id.

110; *Daggett* v. *Norton*, 20 id. 333; *Walker* v. *Mulvean*, 76 id. 18; *Jennison* v. *Jennison*, 66 id. 259.

Mr. JAMES GOGGIN, for the appellees:

Decreeing the specific performance of a contract rests in the sound discretion of the court. Story's Equity Jur. secs. 742, 769; *Alexander* v. *Hoffman*, 70 Ill. 114; *Hoyt* v. *Tuxbury*, 70 id. 331.

The contract was rescinded by the mutual act of the parties. The acceptance of the notice of rescission by the Buckleys, and notice of their assent thereto, terminated the sale.

The assignee of an equity takes subject to all its infirmities, and can have no greater rights than his assignor, and can not, therefore, be protected as an innocent purchaser. Fry on Specific Performance, 114.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court:

This was a bill in equity, brought by appellees, against the Rubber Paint Company, of Cleveland, and Samuel P. Parmly, to cancel and remove from the record a certain memorandum of an agreement made by appellees with the Rubber Paint Company, under which certain land was to be conveyed, and which had been transferred by the Rubber Paint Company to Parmly. Answers were put in to the bill, and the defendant Parmly filed a cross-bill, in which he prayed for a specific performance of the contract, and for general relief. On the hearing the court entered a decree dismissing the cross-bill, and granted the relief prayed for in the original bill.

The contract which complainants sought to cancel was in the following words:

"$100. Received of the Cleveland Rubber Paint Co. $100, deposit of purchase of south forty feet of lot 6, in block 83, school section addition to Chicago. Price to be $11,000, purchaser to assume paying assessment, also taxes of 1880,

and to pay E. A. Cummings & Co. 2½ per cent commission, $10,900, in addition to above $100; to be paid as soon as abstract is furnished showing title.

Chicago, July 9, 1880.

W. T. BUCKLEY,
L. M. BUCKLEY.

"If title can not be made clear, the $100 will be returned on return of this receipt.

W. T. BUCKLEY,
L. M. BUCKLEY."

It appears, from the evidence, that about one month before this agreement was made, the Buckleys had mortgaged the property for $4000, which was not due, and when the parties met, a few days after the making of the agreement, to close the trade, it was ascertained that the mortgagee would not accept the mortgage money unless paid a bonus of $500. The Buckleys refused to pay this bonus, and the Rubber Paint Company refused to take a deed of the property and assume the payment of the mortgage, as it desired the property clear of all liens, hence the deed was not delivered, and the purchase money was not paid.

In the month of August the Buckleys received the following notice from the Rubber Paint Company:

"CHICAGO, ILL., *August 25, 1880.*

"*To W. T. Buckley and L. M. Buckley:*

"You, and each of you, are hereby notified, that having neglected and refused to carry out the contract made by you on the 29th of July, for the sale to the Rubber Paint Company, of Cleveland, Ohio, of the south forty (40) feet of lot six (6), block eighty-three (83), school section addition to Chicago, and you having refused to deliver to said company a deed of said premises in accordance with said contract, and having in all respects refused to comply with and carry out your agreement, the said company therefore considers itself released from all obligations to you by reason of said con-

tract, and will look to you for payment of all costs, expenses and damages incurred by said Rubber Paint Company on account of said contract.

RUBBER PAINT COMPANY,
Of Cleveland, Ohio,
By N. C. BREWER, Man'gr."

Upon receiving the above notice, the Buckleys made out and delivered to the Rubber Paint Company, at its office, the following notice:

"*To the Rubber Paint Company, of Cleveland, Ohio:*

The undersigned having received your letter of August 25, 1880, stating that said company considered itself released from all obligations to us by reason of a contract for the purchase of the south forty (40) feet of lot six (6), in block eighty-three (83), school section addition to Chicago, made on the 29th day of July last, we hereby accept the surrender of said contract by you, and we hereby declare said contract terminated and at an end.

Chicago, August 30, 1880.

L. M. BUCKLEY,
W. T. BUCKLEY."

The parties to the contract of July 9, 1880, had the right, if they saw proper, to cancel and set aside that contract, and the first question to be determined is, whether the two contracting parties have exercised that right.

The notice, bearing date August 25, 1880, signed by the Rubber Paint Company, and served upon the Buckleys, shows a clear intent on the part of the company not to be longer bound by the contract, and a desire that it should be cancelled. Indeed, the company, so far as it was within its power, cancelled the contract. When this notice was received the Buckleys at once notify the company that they accept the surrender of the contract, and declare it terminated and at an end. We are aware of nothing which could have been

done by these contracting parties which would have more effectually put an end to the contract than what they did. The purchaser, in effect, said it did not desire to be bound longer by the contract, and declared it at an end. The vendors at once accepted the proposition of the purchaser, and declared the contract cancelled.

It is, however, said that the notice of August 25 was not in fact signed by Brewer, who was the manager of the company, and hence it is not binding on the company. The notice was, however, prepared and served by an attorney of the company, with the knowledge and consent of Brewer, the manager of the company, and hence he is as much bound by what was done as if he had prepared and served the notice himself. It is also said that the notice given by the Buckleys, that they accepted the surrender of the contract, was not served on the company. The notice was left at the office of the company with a person who was acting as an agent of the company, and was at the time in charge of the company's business. This we regard as sufficient.

It is, however, urged that Parmly, who took an assignment of the contract, as he had no actual notice that the contract had been cancelled, is to be regarded as an innocent purchaser, and as such is entitled to be protected. When Parmly took an assignment of the contract he merely stepped into the shoes of the Rubber Paint Company, clothed with such rights and powers as the company had, and no more. The assignee of a contract of this character takes it subject to its infirmities, and has no greater rights than the assignor had. (Fry on Specific Performance, 2d Am. ed. page 114, note 5, and cases there cited.) It follows, as the Rubber Paint Company had no standing in a court of equity to enforce the specific performance of the contract, the assignee, Parmly, had none.

The decree of the circuit court will be affirmed.

Decree affirmed.

103 121
128 105
103 121
142 398

MARY B. LUCAS

v.

HANNAH L. LUCAS.

Filed at Ottawa May 12, 1882.

1. FRAUDULENT CONVEYANCE—*as to subsequent creditors.* A voluntary conveyance by a husband and wife to a party who immediately reconveys to the wife, can not be impeached as fraudulent as against subsequent creditors of the husband, when there is no evidence that the conveyance was colorable, merely, and that a secret trust and confidence existed for the benefit of the husband, or that the deeds were made in anticipation of incurring debts to avoid which the conveyances were made.

2. SAME—*voluntary conveyance not rendered bad by attempting to prove consideration.* An attempt on a creditor's bill to prove a valuable consideration for a conveyance of land, and failure to establish it, will not deprive the grantee of the right to claim its benefit as a voluntary conveyance without fraud.

3. CURTESY—*since 1861, does not vest in wife's lifetime.* Since the Married Woman's act of 1861, the husband's right to an estate by the curtesy in the lands of his wife is contingent, and does not vest in the husband until after the death of the wife.

APPEAL from the Circuit Court of Peoria county; the Hon. N. M. LAWS, Judge, presiding.

Messrs. COOPER & TENNERY, for the appellant:

If the wife had in fact, prior to 1869, paid $1800 on her husband's debts, or more, it did not create the relation of debtor and creditor between them, and consequently such payments could have formed no sufficient consideration for the conveyance from the husband to her. Prior to 1869 the earnings of a wife were the property of her husband. *McDavid* v. *Adams*, 77 Ill. 155; *Jassoy* v. *Delius*, 65 id. 469; *Hazelbaker* v. *Goodfellow*, 64 id. 238; *Conner* v. *Berry*, 46 id. 370; *McMurtry* v. *Webster*, 48 id. 123; *Schwartz* v. *Saunders*, 46 id. 18; *Farrell* v. *Patterson*, 42 id. 52; *Bear* v. *Hays*, 36 id. 280.

It requires clear and incontrovertible evidence to establish a gift from a husband to his wife as a matter of intention and fact, and when so shown, if there is no ground to suspect fraud, and it amounts to a reasonable provision, it will be sustained. 2 Story's Eq. Jur. sec. 1375.

When the grantee takes as a volunteer, it does not matter whether he intended to aid in a fraud. *Tunison* v. *Chamblin*, 88 Ill. 378.

A voluntary conveyance by a husband to his wife in anticipation of incurring debts, or which is colorable merely, for the benefit and secret use of the grantor, is void as to subsequent creditors of the grantor. *Tunison* v. *Chamblin*, 88 Ill. 378; *Jones* v. *King*, 86 id. 225; *Hook* v. *Moore*, 17 Iowa, 197.

Messrs. WILSON & WOOLSEY, for the appellee:

When existing creditors are not injured, a husband may convey real estate to his wife. *Lincoln* v. *Laughlin*, 74 Ill. 11.

A purchase of land by a husband, with his own means, in his wife's name, without fraudulent intent, will be sustained as against subsequent creditors. *Elder* v. *Jones*, 85 Ill. 384; *Indianapolis, Bloomington and Western Ry. Co.* v. *McLaughlin*, 77 id. 275; *Haines* v. *Haines*, 54 id. 274; *Patrick* v. *Patrick*, 77 id. 585; *Bradford* v. *Riddell*, 55 id. 261; *Yazel* v. *Palmer*, 81 id. 82; *Moritz* v. *Hoffman*, 35 id. 553; *Jones* v. *King*, 86 id. 225.

Since 1861, the husband's right by the curtesy in his wife's land is contingent, depending upon his surviving her. *Beach* v. *Miller*, 51 Ill. 206.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a proceeding of interpleader, by the appellee, Hannah L. Lucas, in a foreign attachment suit brought by appellant, as administratrix of the estate of David Lucas, deceased, against George L. Lucas, to the October term, 1881, of the Peoria county circuit court, the writ of attach-

ment having been levied upon certain lots in an addition to the city of Peoria, as the property of said George L. Lucas. Appellee, the wife of George L. Lucas, by her interpleader claimed ownership in fee of the lots. A trial was had before the circuit court, without a jury, of the issue as to the ownership of the property, which resulted in a finding and judgment in favor of appellee.

The lots were conveyed by George L. Lucas and Hannah L., his wife, to John C. Yates, by warranty deed, dated October 11, 1873, for the expressed consideration of $1000, and on the same day, for the same expressed consideration, Yates made a quitclaim deed of the lots to said Hannah L. Lucas, the appellee. The claim of appellant is, that this conveyance to Hannah L. Lucas was fraudulent as to the creditors of George L. Lucas. The evidence in the record tending to show this, is of a quite meagre kind. The debt, which is the subject of the attachment suit, arose subsequently to the conveyance, being a note of George L. Lucas, given January 20, 1876, to David Lucas, for $500. All the existing indebtedness of George L. Lucas, at the time of the conveyance, shown, was a judgment against him in favor of one Burns for $378.31, rendered at the April term, 1873, of the Peoria county circuit court. All the other property shown to have been owned by him at the time was an undivided half of eighty acres of land in Peoria county, the title to the other half appearing to have been in his wife, Hannah L. Lucas, by conveyance to her from Sarah J. and Michael Crow, made April 13, 1871. This eighty acres was conveyed by George L. Lucas, and his wife, Hannah L., to David Lucas, by warranty deed, dated February 10, 1874, for the consideration expressed, of $5000, subject to a trust deed to secure $1500. On the Burns judgment above named, against George L. Lucas, two executions, issued July 18, 1873, and October 16, 1873, had been returned no property found, and a further execution on the judgment, issued October 6, 1874, was levied

upon said eighty acres of land, and satisfied in full by the sale thereof, November, 1874, to Burns, for $460.36, and to redeem from this execution sale, George L. Lucas borrowed $500 from David Lucas, and gave to him therefor the note on which the attachment suit was brought, George L. having before, as already said, sold the land to David Lucas, and given a covenant of warranty. All the evidence as to the value of the lots in question is, that they were good security for $3000. This is the substance of all the testimony bearing upon the question involved. There is no direct evidence of any fraudulent purpose, or evidence that the conveyance was colorable only, and that a secret trust and confidence existed for the benefit of the grantor, George L. Lucas, or that the deed was made in anticipation of incurring debts, to avoid the payment of which the conveyance was made. Cases in which this court has recognized that such a conveyance might be avoided by subsequent creditors: *Tunison* v. *Chamblin*, 88 Ill. 378; *Jones* v. *King*, 86 id. 225.

From the circumstances disclosed, we perceive no sufficient ground for the impeachment of the conveyance here as being fraudulent as against subsequent creditors. Although the conveyance to the wife was voluntary, this of itself—no fraudulent intent appearing, nor such facts as above named,—does not render the deed void as to subsequent creditors. *Moritz* v. *Hoffman*, 35 Ill. 554; *Bridgford* v. *Riddell*, 55 id. 261.

But inasmuch as there was an attempt to prove a valuable consideration, to the extent of $1800, for money advanced by the wife for her husband, and that the conveyance was made in payment of this alleged indebtedness of that amount from the husband to the wife, and there was failure in this, it appearing that the money was but earnings of the wife which belonged to the husband, it is insisted that this fruitless attempt to show a valuable consideration precludes the appellee from availing herself of the deed as a voluntary

conveyance. The attempt to prove a valuable consideration indicated an idea that such a consideration was necessary to sustain the conveyance; but the failure to prove a consideration leaves the deed standing as a voluntary conveyance, and if such a conveyance be good as against the subsequent creditors, we know no reason why the grantee should be deprived of the enjoyment of the benefit of the deed as a voluntary conveyance, from the circumstance of having attempted to prove the payment of a valuable consideration and failing in the attempt.

It is claimed that there was an estate as tenant by the curtesy in the husband, which was subject to the attachment. It is sufficient to say, in answer to this, that in *Beach* v. *Miller*, 51 Ill. 206, it was held that since the act of 1861, the husband's right to the curtesy in the land of his wife is contingent, and does not vest in the husband until the death of the wife.

We find no cause for disturbing the finding and judgment of the circuit court, and the judgment is affirmed.

Judgment affirmed.

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103 125
57a 163
103 125
170 455

E. F. C. KLOKKE

v.

JOHN H. P. DODGE.

Filed at Mt. Vernon January 18, 1882—Rehearing denied May Term, 1882.

1. COUNTY COURTS AND PROBATE COURTS—*of their jurisdiction of probate and other matters.* Section 18 of article 6 of the constitution of 1870, declares that county courts shall have jurisdiction in all matters of probate, settlement of estates of deceased persons, appointment of guardians and conservators, and settlement of their accounts, in all matters relating to apprentices, and in proceedings for the collection of taxes and assessments, and such other jurisdiction as may be provided for by general law.

2. By section 20 of the same article, it is provided that probate courts, when established under the constitution, shall have original jurisdiction in all matters of probate, the settlement of estates of deceased persons, the appointment of guardians and conservators, and the settlement of their accounts, in all matters relating to apprentices, and in cases of the sales of real estate of deceased persons for the payment of debts.

3. Upon the establishment of a probate court in a particular county, the county court of such county is at once, by operation of law, deprived of its jurisdiction in matters of probate, and in all other matters over which probate courts are given jurisdiction. There can not be concurrent jurisdiction between the two courts in the same county. The jurisdiction of the probate courts is exclusive.

4. SAME—*of the extended jurisdiction of county courts in counties in which probate courts are or may be established—constitutionality of the act of 1881.* The act of 1881, "to extend the jurisdiction of county courts in counties in which probate courts are or may be established," provides, "that in all counties in which probate courts are or may hereafter be established, county courts may have concurrent jurisdiction with the circuit court in all cases at law and in equity, except criminal cases where the punishment may be death, or confinement in the penitentiary:" *Held*, the act was unconstitutional, the extended jurisdiction attempted to be thereby conferred being restricted to county courts in certain counties, and not affecting the county courts in all the counties in the State alike, thus being within the inhibition of that clause of sec. 29, art. 6, of the constitution, declaring the jurisdiction "of all courts of the same class or grade" shall be uniform.

5. So it was *held*, the county court of Cook county, that being one of the counties in which a probate court has been established, and in which it was sought to make the act operative, has no jurisdiction of a bill in chancery for relief against certain taxes alleged to have been illegally assessed against the property of the complainant.

APPEAL from the County Court of Cook county; the Hon. MASON B. LOOMIS, Judge, presiding.

Messrs. CONDEE & BLISS, for the appellant.

Mr. H. T. GILBERT, and Mr. D. B. SNOW, for the appellee.

Mr. JUSTICE SCOTT in announcing the judgment of the Court said:

Section 1 of "An act to extend the jurisdiction of county courts in counties in which probate courts are or may be established," in force July 1, 1881, provides, "that in all

counties in which probate courts are or may hereafter be established, * * * county courts shall have concurrent jurisdiction with the circuit court in all cases at law and in equity, except criminal cases where the punishment may be death, or confinement in the penitentiary." Under the provisions of this statute complainant exhibited his bill in the county court of Cook county, for relief against certain taxes alleged to have been illegally assessed against his property. The county court entertained the bill and granted the relief. By an agreement of parties, entered of record, an appeal was taken from the decision of the county court to the Supreme Court, sitting in the Southern Grand Division. The only questions discussed in this court have relation to the constitutionality of the section of the statute conferring extended or increased jurisdiction on county courts in counties in which probate courts are or may hereafter be established. Unless the act cited is constitutional, it is not claimed the county court had jurisdiction to entertain the bill.

Section 18, art. 6, of the constitution, which provides for the election of county judges in the several counties of the State, also declares county courts shall be courts of record, and shall have jurisdiction in all matters of probate, settlement of estates of deceased persons, appointment of guardians and conservators, and settlement of their accounts, in all matters relating to apprentices, and in proceedings for the collection of taxes and assessments, and such other jurisdiction as may be provided for by general law. Under this section of the constitution county courts were organized in the several counties of the State, having and exercising uniform powers and jurisdiction. Section 20, of the same article of the constitution, confers power on the General Assembly to establish probate courts in counties having a population of over fifty thousand inhabitants. No doubt this power could be exercised by the General Assembly at any time whenever the interests of the inhabitants of the counties embraced in

the class indicated might, in its judgment, require probate courts to be established. Probate courts, when established under the constitution, shall have original jurisdiction in all matters of probate, the settlement of estates of deceased persons, the appointment of guardians and conservators, and the settlement of their accounts, in all matters relating to apprentices, and in cases of the sales of real estate of deceased persons for the payment of debts. It will be noted the constitution makes no provision for giving probate courts, when established in counties having over fifty thousand inhabitants, exclusive original jurisdiction in matters over which they may exercise jurisdiction. All county courts, by the express terms of the constitution, (sec. 18, art. 6,) have original jurisdiction in all matters of probate, settlement of the estates of deceased persons, the appointment of guardians and conservators, and in other matters enumerated, and it is not apprehended it is in the power of the General Assembly to take away from county courts jurisdiction conferred upon them by the constitution. Probate courts may be established in a class of counties indicated by their population whenever the legislature may see proper to do so, and such courts will have original jurisdiction in certain matters, but there is no authority in the constitution for making that jurisdiction exclusive. Both courts have, and may continue to have, original jurisdiction in a class of cases designated. Nothing contained in the constitution is inconsistent with the existence of two courts in the same county having original jurisdiction in the same class of cases. More than once this court has had occasion to apply this construction to county and circuit courts. It has been decided the General Assembly has no power to take from circuit courts original jurisdiction, which they have under the constitution, and transfer it to the exclusive jurisdiction of county courts. Concurrent jurisdiction with the circuit courts in certain matters might be conferred on county courts, but that jurisdiction could not be made

exclusive in the latter courts. (*Myers* v. *The People*, 67 Ill. 503; *Mapes* v. *The People*, 69 id. 523.) It is needless to say that such jurisdiction as the legislature may rightfully confer upon any court may be revoked at any time by the same authority, but jurisdiction given by the constitution to a court can not be taken from it by the legislature and transferred to another court.

This construction is conclusive against the correctness of the proposition, so confidently stated, that county courts in counties where probate courts have been or may be established, are a different class of courts from county courts in counties having no probate courts. Such is not the fact, and there is no warrant for any distinction. Although a probate court may be established in any county having a population of over fifty thousand inhabitants, yet the county court of that county will retain all the jurisdiction given it by the constitution, even in matters that may also be within the jurisdiction of the probate court. It is for the unanswerable reason the constitution has declared what jurisdiction a county court may exercise, and it has not provided any portion of that jurisdiction may be taken away or transferred to the exclusive jurisdiction of a probate or any other court. It is apparent, then, that county courts in all the counties of the State have, and must have under the constitution, the same powers and jurisdiction, whether probate courts are established in some of them or not, and hence constitute a "class of courts," within the meaning of that instrument, concerning which all laws must be general, and of uniform operation. The section of the statute cited, in terms, applies only to county courts in counties in which probate courts are or may be established, giving to such courts concurrent jurisdiction with circuit courts in certain matters in law and in equity. Judicial notice will be taken of the fact but few counties in the State have a population of over fifty thousand inhabitants, and by reason of that fact may have a probate court. It is plain, therefore,

the law that purports to confer increased or extended jurisdiction on county courts in counties where probate courts are or may hereafter be established, applies only to a part of a class or grade of courts, and falls within the inhibition of that clause of section 29, art. 6, of the constitution, which declares, "all laws relating to courts shall be general, and of uniform operation, and the organization, powers, proceedings and practice of all courts of the same class or grade, so far as regulated by law, and the force and effect of the process, judgments and decrees of such courts, severally, shall be uniform." Had the convention which framed the constitution intended, as the argument maintains, the effect of establishing probate courts in counties having the requisite population would be to deprive county courts in such counties of that jurisdiction they previously had under the constitution, and which probate courts might thereafter exercise, it is singular such language was not employed as would have made that intention clear. But that was not done. The constitution contains nothing, that in the slightest degree indicates that probate courts shall have *exclusive* jurisdiction over matters within their jurisdiction, when established. Probate courts, when established, the constitution itself limiting their powers, can only have concurrent jurisdiction with county courts in certain matters, and that is all. The intention of the framers of the constitution can only be accurately ascertained from the words employed to express their meaning, and the words employed are to be understood in their ordinary and usual signification, otherwise there could be no safe or uniform interpretation of such instruments. Courts are not at liberty to suppose one thing or another was meant, unless it is plainly expressed, or arises by necessary implication from unambiguous terms employed.

The question now being considered, whether the jurisdiction county courts had in probate matters under the constitution, passed exclusively to probate courts when they should

be established, was not raised or discussed in *The People* v. *Loomis*, 96 Ill. 377. It does not appear that phase of the case was presented to the court. The only point decided was, whether the county court of Cook county, since a probate court was established in that county under the provisions of the act of 1877, still had jurisdiction to foreclose a mortgage made by a guardian on behalf of his ward, and it was held that under the act of 1869, applicable to all county courts in the State, irrespective of the fact whether probate courts had been established or not, the court had jurisdiction to entertain a bill for that purpose. It was thought that neither the section of the constitution that provides for the establishment of probate courts, nor the act of the legislature, had deprived the county court of jurisdiction in such cases.

In the views here expressed only two other members of the court concur with the writer. A majority of the court, however, are of opinion the "Act to extend the jurisdiction of county courts in counties in which probate courts are or may be established," in force July 1, 1881, is unconstitutional, and for that reason it follows it was error in the county court to entertain jurisdiction of the bill, and its decree will be reversed and the bill dismissed.

Decree reversed.

Mr. JUSTICE MULKEY: While I concur in the conclusion reached in this case by a majority of the court, I am unable to give my assent to the grounds upon which the decision is placed, as expressed in the foregoing opinion. Therefore, in justice to myself, and in order to avoid any misapprehension with respect to the position of the court upon the subject, I deem it proper that I should present my own views in a separate opinion, and shall accordingly do so.

It is provided by section 29 of article 6 of the constitution, that "the organization, *jurisdiction, powers,* proceedings and practice of all courts of the same class or grade, so far as

regulated by law, * * * shall be uniform." Now, it is manifest if there was no other provision in the constitution operating as an exception to or limitation upon the one just cited, the legislature would have no power or authority to confer, as was attempted to be done in this case, chancery jurisdiction upon one or more of the county courts in the State, without at the same time conferring it upon the others also. The framers of the constitution, however, foresaw that in very large counties the business of these courts might, and probably would, increase to such an extent as to require a separation of the probate from the other business therein; and with a view of providing for such a contingency, they, by the 20th section of the same article of the constitution, declared that the legislature might provide for the establishment of probate courts, with "original jurisdiction in all probate matters, the settlement of estates of deceased persons, the appointment of guardians and conservators, and settlement of their accounts, in all matters relating to apprentices, and in cases of sales of real estate of deceased persons for the payment of debts." The only limitation on the power of the legislature to establish these courts in the several counties in the State, as will appear from the various provisions of the constitution relating to the subject, is the one contained in the 20th section itself, which forbids the establishment of such courts in any county not having a population in excess of fifty thousand. *Knickerbocker* v. *The People ex rel.* 102 Ill. 218.

It will be perceived by reference to the 18th section of article 6 of the constitution, which creates county courts and defines their jurisdiction, that the jurisdiction of these courts and of probate courts, so far as it relates to "matters of probate, settlement of estates of deceased persons, appointment of guardians and conservators, and settlement of their accounts, in all matters relating to apprentices," is the same. But in addition to this, county courts are by the same section

given jurisdiction "in proceedings for the collection of taxes and assessments, and such other jurisdiction as may be provided by general law."

The question is then presented whether probate courts, when established by the legislature under the 20th section, were intended to take the place of and be substituted for county courts, in so far as the jurisdiction of the two courts, as specifically defined in the constitution, is the same.

I frankly confess this question is not free from difficulty, and that it cost me much thought and reflection before arriving at a satisfactory conclusion. My first inclination was, that no such substitution in the respect stated was intended, but upon more mature consideration of the matter I am fully satisfied that such was the intention of the framers of the constitution. I concede the general proposition that where two courts of like powers and jurisdiction, in whole or in part, are established at different times in the same judicial district, the law creating the second court will not ordinarily, in the absence of an express declaration to that effect, operate as a repeal of the act establishing the first court, in so far as their jurisdiction is the same, but in such cases the jurisdiction of the two courts will be regarded as concurrent. Yet this, like all other rules, is subordinate to the universal and fundamental principle that all laws must be so construed as to give effect to the intention of the law-makers. The above general rule, subject to the fundamental limitation just stated, has been fully recognized by this court in construing the constitution.

The real question, therefore, to be determined now is, what did the framers of the constitution intend in this particular instance? If it was customary for matters of probate to be transacted in two or more courts in the same judicial district or territorial limits, or if this might be done without occasioning great inconvenience, I should unhesitatingly say the jurisdiction was intended to be concurrent, and not a mere transfer

of it from one court to another. But such is not the case. The proposition that there may be, under our constitution, two courts in the same county at the same time exercising probate jurisdiction, is not only novel, but it is believed no instance of the kind can be found; and the very fact it is without precedent, affords a strong reason why the constitutional convention could not have intended it. Moreover, I am confident if the constitution should be thus construed it would lead to great confusion and inconvenience in the management and settlement of estates, and this, to my mind, affords a conclusive reason why such a construction should not receive judicial sanction. For instance, letters of guardianship or of administration might happen to be made by different persons at the same time—one in one court, and the other in the other. In such case, each court might insist on maintaining its own jurisdiction, and neither applicant might be willing to yield to the other. This would evidently give rise to rival claimants of the same estate, and while these contests would be going on, the estate itself might, and doubtless would, suffer, to the detriment of those interested in it. Any number of complications of this character might readily be suggested, but it is unnecessary to do so.

There is one matter, however, in this connection, which deserves special notice. I allude to the great inconvenience it would be to creditors and others interested in estates, who are constantly having occasion to examine the probate records for the purpose of ascertaining their condition and of seeing how they are administered, if they were compelled, as they certainly would be if the construction contended for is the correct one, to examine the records of two courts, instead of one, before they could certainly know their exact condition. It would be difficult, if not impossible, to estimate the inconvenience and trouble which would inevitably arise from this cause alone, to say nothing of the other evils suggested, growing out of such a system.

These considerations, in addition to many others of a like character that might be mentioned, in my judgment absolutely forbid the idea that the framers of the constitution ever intended there should be two courts having probate jurisdiction in the same county.

I hold, therefore, the establishment of a probate court, under the constitution, in a particular county, is *ipso facto* a revocation of the jurisdiction of the county court of such county as to all matters over which probate courts are given jurisdiction, and with respect to which county courts in counties not having probate courts exercise a similar jurisdiction,—or, in other words, that upon the establishment of a probate court in a particular county, the county court of such county is at once, by operation of law, deprived of its jurisdiction in matters of probate, and in all other matters over which probate courts are given jurisdiction, for there is no such a thing, in my judgment, as concurrent jurisdiction between the two courts in the same county. The jurisdiction of the latter courts is clearly exclusive. And in this conclusion I am authorized to say that Mr. Chief Justice Craig and Justices Dickey and Sheldon concur.

This being the effect of establishing a probate court under the 20th section of article 6 of the constitution, it follows the legal operation of that section is to create an exception to or a limitation upon the 29th section of the same article, which requires the jurisdiction and powers of county courts, and other courts of the same class or grade, to be uniform. Taking the two sections together, so far as the present inquiry is concerned, they, in effect, declare that the jurisdiction and powers of the county courts of this State shall be uniform, except in counties having a population in excess of fifty thousand, in which the legislature shall establish probate courts, in which latter counties the county courts shall exercise no probate or other jurisdiction which is specifically conferred upon probate courts, but that in all other respects

their jurisdiction and powers shall be the same as those exercised by other county courts in counties where no such probate courts are established,—in other words, the constitution has authorized this uniformity of jurisdiction with respect to county courts, under certain circumstances, to be partially disturbed or broken by withdrawing from them a certain portion of their jurisdiction, specifically determined by the constitution itself, for the purpose of conferring the same upon certain special tribunals, called probate courts, created for the express purpose of relieving county courts of a portion of their business, which the framers of the constitution supposed, in course of time, would increase to such an extent as to require the relief in question.

So far the constitution has authorized a departure from the rule created by that instrument requiring the jurisdiction of county courts to be uniform, and no further. Clearly the authorizing of an infraction of a general rule for a specific purpose does not confer authority to break the rule for a different purpose. The constitution, in effect, says to the legislature, you may, under certain contingencies, for the purpose of relieving county courts in large counties where their business has greatly increased, withdraw from them a specific portion of their jurisdiction; but this certainly does not authorize the legislature, after having exercised the power in this respect, to go on and destroy the uniformity in the jurisdiction of these courts in other respects. A power to deprive a court of a portion of its jurisdiction affords no authority for conferring additional jurisdiction on the same court, as was attempted in this case.

If it be suggested the legislature is authorized to increase the jurisdiction of county courts without any constitutional grant for that purpose, the obvious answer is, that this power is subject to the qualification that such increase of jurisdiction must extend to all county courts in the State, so as to give effect to the provision of the constitution requiring

uniformity of jurisdiction. Outside the special jurisdiction conferred upon probate courts, which can neither be enlarged nor diminished, the legislature may alter or change the jurisdiction of county courts, except in so far as it is controlled by the constitution, at pleasure, provided the legislation for such purpose is general, and applicable alike to all county courts in the State.

The position that the giving of the legislature authority, under certain circumstances, to partially depart from the rule of uniformity with respect to certain specifically determined subjects of jurisdiction, affords any authority for a further departure from the rule with respect to other jurisdictional matters not embraced in the constitutional category, is wholly at variance with every principle of law and logic. Nevertheless, the legislature, merely because the constitution authorizes a departure from the rule of uniformity in the respect stated, has gone on and attempted to confer on county courts in all counties where probate courts have been established, "concurrent jurisdiction with the circuit courts in all cases at law and in equity, except in criminal cases where the punishment may be death or confinement in the penitentiary." This act I regard in palpable violation of section 29 of article 6 of the constitution, requiring uniformity of jurisdiction in county courts, and it is no answer to this objection to say, that because the uniformity of jurisdiction of these courts was by the authority of the constitution partially destroyed, they thereby became a separate class of courts, whose jurisdiction might be increased or diminished to any extent the legislature might think proper, without any regard to the jurisdiction of county courts in counties not having probate courts, for there is nothing in the constitution that warrants this assumption. There is but one class of county courts known to the constitution and laws of this State, and their jurisdiction and powers, in my judgment, must be uniform, except in so far as the constitu-

tion has otherwise expressly provided. To sustain such legislation as this, would be to defeat the very object and purpose of the constitution in providing for probate courts. The latter courts are created for the purpose of relieving such of the county courts as are supposed to be unable to do all the business brought to them, and not merely to enable them to get rid of their appropriate business, so that the legislature may in effect convert them into circuit courts, as was attempted to be done in this case.

JAMES W. SCHOLFIELD *et al.*

v.

FRANK C. POPE.

At Ottawa, March Term, 1882.

PRACTICE IN THE SUPREME COURT—*motion should state proper grounds.* A motion to dismiss an appeal for an alleged want of jurisdiction in this court, will not be entertained except it be accompanied by a statement of the particular ground upon which the question of jurisdiction is to arise.

APPEAL from the Circuit Court of Cook county.

At the present term, Mr. JAMES F. MEAGHER, in behalf of the appellee, moved the court to dismiss this appeal, for the following reason: "Because said Supreme Court has no jurisdiction to hear and determine said appeal."

DICKEY, J.: This motion does not contain, nor is it accompanied by, any statement of the ground upon which the question of jurisdiction is to arise. We can not go to the record to search for some possible ground for the motion. A proper statement should be made. We do not allow or deny the motion, but simply refuse to entertain it at all. The motion can be renewed on a proper statement.

Syllabus.

THE PEOPLE *ex rel.* Cunningham

v.

NAPOLEON B. THISTLEWOOD *et al.*

At Springfield, June Term, 1882.

103 139
35a 27
103 139
40a 102
103 139
178 610
103 139
96a 1441
103 139
193 1523
193 1569
193 1587

1. MANDAMUS—*as an original proceeding in this court—practice—not controlled by the statute.* The statute regulating the practice in *mandamus* cases (Rev. Stat. 1874, p. 691,) has no application to practice in the Supreme Court. It was designed to regulate the practice in the circuit courts, and not in this court. However, the practice in such cases in this court will be made to conform, as nearly as may be, to that as regulated by statute in the circuit courts.

2. SAME—*petition filed only upon leave—summons awarded only upon cause—when returnable.* The summons in *mandamus*, in an original proceeding in the Supreme Court, will not be awarded, as a matter of course, but only upon cause shown by petition,* and the petition can be filed only upon leave granted for that purpose.

3. If, upon examination of the petition, no cause is shown for awarding the summons, it will be denied,† as was the practice in this court before the passage of the statute. Where the petition shows sufficient cause, the summons will be ordered to be issued, as it would from the circuit court.‡

4. If the matter to be litigated concerns the public interest, the court has uniformly made the writ returnable to the term at which the application is made, but if it be of a mere private nature, the practice is to make the writ returnable to the succeeding term.

5. SAME—*also, of the time of service of the summons.* The summons should, in any case, be made returnable at a time not less than five days

* The writ of *mandamus* will not be awarded in the Supreme Court upon mere motion,—a petition must be presented showing the grounds of the application. *The People ex rel.* v. *Loomis*, 94 Ill. 587.

† This writ is not now, as formerly, a prerogative writ; it is nothing more, under our statute, than an ordinary action at law in cases where it is the appropriate remedy. Yet it is to be issued in the discretion of the court. *People ex rel.* v. *Weber*, 86 Ill. 285. Under the statute, the petition takes the place of the alternative writ, and defects in it are to be taken advantage of as they were when found in the alternative writ; and defects in substance can be taken advantage of at any time before the granting of the peremptory writ,—even after return made. *People ex rel.* v. *Davis*, 93 Ill. 133.

‡ Upon asking leave to file a petition for a writ of *mandamus* in this court, it is not necessary to couple with such application a motion that a summons or an alternative writ be awarded. Upon granting leave to file the petition, if, upon examination, it is found that sufficient cause is shown, the summons will be awarded without any special motion for that purpose. *Blatchford et al.* v. *Newberry et al.* 100 Ill. 484.

Statement of the case.

prior to the hearing, but there is nothing in the statute or in the practice that obtains, which requires there should be five days service before the matter can be heard in this court.

6. CONTINUANCE—*in mandamus—for want of service.* It is a sufficient ground for a continuance in a proceeding for *mandamus* in this court, where the action or conduct of several persons is sought to be affected or controlled by the writ, that some of the persons so to be affected have not been served with the summons.

This is an original proceeding in this court, for a writ of *mandamus*.

The petitioner, Justus R. Cunningham, alleges that at a general election held in and for the city of Cairo, he was elected to the office of city attorney of said city, and that the city council and the city clerk, together with the mayor of the city, refuse to execute their duties in respect of such election to the end that the petitioner may be properly invested with his said office to which he was so elected. The petitioner therefore prays that the mayor and common council and the city clerk be compelled by *mandamus* to perform their proper duties in the premises. Upon leave given, the petition was filed, and summons awarded, and duly issued, and served upon a portion of the defendants.

At the present term, Messrs. GREEN & GILBERT, in behalf of those defendants upon whom service had been made, moved the court for a continuance of the cause, upon two grounds:

First—Because the summons was not served upon these defendants, or any of them, in apt time for the same to be answered unto on the return day thereof.

Second—There has been no service of said process upon Napoleon B. Thistlewood, mayor, or Dennis J. Foley, city clerk, of the city of Cairo.

Counsel cited the statute concerning the "action of *mandamus*," (Rev. Stat. 1874, p. 691,) and contended that where the summons is issued in term time, as in this case, it should be served at least five days before the return day in order to make it a sufficient service, and place the party in default

under section 2 of the act. This is urged in support of the first ground assigned for a continuance, there not having been service of process upon any of the defendants five days before the return day.

SCOTT, Ch. J.: It is insisted that the statute which regulates the practice concerning *mandamus*, and requires that a writ should be returnable in not less than five days, makes it also imperative that there should be service for that length of time. This court has had frequent occasion heretofore to decide that the statute regulating the practice in *mandamus* cases has no application to practice in this court. It was designed to regulate the practice in the circuit courts in such cases, and not in this court. We have therefore always required that, before a summons shall be issued, application shall be made to this court for leave to file the petition; and it is not issued as a matter of course, but upon cause shown. We have, however, said, and the practice has been, that we will make the practice in such cases in this court conform, as near as may be, to that as regulated by statute for the circuit courts, and we have, therefore, in every case where we have found the petition shows sufficient cause, ordered the summons to issue as it would from the circuit court; but, if we think, upon examination, no cause is shown for awarding the summons, it will be denied, as was the practice in this court before the passage of the statute. Where the matter to be litigated concerns public interest, we have uniformly made the writ returnable to the term at which the application is made. Where it is of a mere private nature, the practice is to make the writ returnable to the succeeding term. In this case we thought the matters set forth in the petition were of such public importance that the writ ought to be made returnable to the present term, and it was accordingly so done. There is, therefore, nothing in the statute or the practice that obtains that makes it imperative that there

should be five days service before the writ can be heard in this court, but it must be made returnable at a time not less than five days.

The other reason, however, assigned for a continuance, namely, that the parties have not all been served, is well taken. The parties to be affected, whose action is to be controlled, are not all before the court, and we are of opinion, until they are all before the court we have no jurisdiction to hear the case. It will, therefore, be continued for service upon the parties not served.

Motion allowed.

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103 142
22a 596
103 142
125 636
103 142
39a 386

JOHN D. McINTYRE

v.

THE PEOPLE, for use of Alice Wilkey.

Filed at Springfield March 28, 1882—Rehearing denied June Term, 1882.

1. ALTERATION—*of guardian's bond will not affect ward.* The adding of another name as security in the body of a guardian's bond, and the signing and sealing of such bond by the new surety, under an order of court requiring additional security, even if unlawful, will not affect the security of the ward in the bond as originally made, or defeat a recovery thereon; and if lawfully made, the ward may treat the bond as that of all the sureties named in it after its alteration, and may sue any one of such sureties separately.

2. GUARDIAN—*loans must be approved by county court.* Where a guardian loans his ward's money, the statute requires that the county court must approve the security; and the ward may treat a loan made without such approval of the county court as an appropriation of the money to the guardian's own use. The statutory requirement that the security shall be approved by the court is mandatory, not merely directory.

3. GUARDIAN'S BOND—*action lies on, without first fixing guardian's liability.* Under the statute, it is not necessary that the guardian's account shall be adjusted in the county court, and the extent of his liability thereby ascertained, before an action will lie against his sureties upon his bond. The damages may be ascertained in the suit on the bond.

Statement of the case.

4. Evidence—*parol, as to action of a court of record, not proper.* The county court being a court of record, having a seal and a clerk, its proceedings can only be shown by its record. Hence parol evidence that the court approved of the security taken by a guardian for moneys of his ward loaned, is not admissible in a suit upon the guardian's bond. If an order of approval was in fact made, but not recorded, the only remedy is by an application to that court, in apt time, upon notice and proper proof, to have its record amended or completed.

Writ of Error to the Appellate Court for the Third District;—heard in that court on writ of error to the Circuit Court of Tazewell county; the Hon. Ninian M. Laws, Judge, presiding.

This is an action upon a guardian's bond. Judgment in the circuit court was against the defendant. This was affirmed in the Appellate Court, and defendant in the circuit court brings the case here on error.

At November term of the county court of Tazewell county, in 1869, H. K. Alexander was appointed guardian of Alice Wilkey, then a minor, and gave bond as such, with one Rupert and John D. McIntyre as sureties, in the sum of $20,000, conditioned that Alexander should discharge the office and trust of such guardian according to law, and should render a fair and just account of his guardianship to the county court of the county of Tazewell, from time to time, as should be required by that court, and should comply with all orders of said court, lawfully made, relating to the goods, chattels and mortgages of said minor, and should render and pay to such minor all moneys, goods and chattels, title papers and effects, which might come to the hands and possession of such guardian belonging to such minor, when such minor should be entitled thereunto, or to any subsequent guardian, should such court so direct. Alexander entered upon his duties as such, and so continued to be such guardian until 1877, when he died. Alice Wilkey became of age February 4, 1878. In April, 1875, the county court made an order

requiring Alexander to give additional security on his bond, and thereupon William S. Maus subscribed his name and seal to the original bond immediately below the original signatures and seals. This was done under the supervision of the judge of the county court, and the name of Maus was inserted in the body of the bond as one of the sureties at that time.

The amended declaration contained two counts. The first describes the bond as that of Alexander as principal, and of Rupert and McIntyre as sureties, and alleges its execution on December 3, 1869, which is the date upon the face of the bond. The second count alleges the making of the bond by Alexander, Rupert and McIntyre, as in the first count, and alleges further that on April 3, 1875, Alexander was ordered by the county court to give additional security, and thereupon Maus subscribed his name to the bond as additional security, which was approved by the court, as Alexander's guardian's bond, and this was done with the full consent of McIntyre, and without the knowledge of Alice Wilkey. Each count alleges breaches of the bond in failure to pay over moneys in the hands of Alexander.

Defendant filed seventeen pleas, embracing pleas of *non est factum*. Issues were formed, and a trial by jury had. The jury found the issues for plaintiff, finding the debt $20,000, and the damages $3699.99, and judgment was entered upon the verdict. The case was taken, on error, to the Appellate Court, and the judgment was there affirmed. McIntyre brings the cause here by writ of error.

Messrs. Prettyman & Sons, for the plaintiff in error:

A guardian, by the common law, is required to loan the money of his ward, and keep it loaned for the ward's benefit carefully and prudently, and the statute enjoins it also, "upon security to be approved by the court." The statute does not require this approval of the security to be entered of record.

Brief for the Defendants in Error.

The presentation of the matter to the judge, and his consent and approval of the loan, should protect the guardian, whether the judge makes any order on the records or not. As the guardian can not compel the making of any such entry, it seems he should be allowed to prove the fact that the court approved the loan and security. If the guardian acts with prudence, care and good faith, he should not be held liable for a loss. *Howard* v. *Amoy*, 9 Pick. 461; *Lowell* v. *Minat*, 20 id. 116; *Kommaker* v. *Kimmel*, 1 Pa. 207.

The county court must first find the amount due from the guardian, and direct its payment, before bringing suit against his sureties. *Stilwell* v. *Mills*, 19 Johns. 303; *Gilbert* v. *Guptil*, 34 Ill. 138; *Groff* v. *Mismer*, 52 Cal. 136; *Salsbury* v. *Von Helser*, 3 Hill, 77; *Davis* v. *Dello*, 6 N. H. 399.

A material alteration of a bond increasing the liability of a surety, or diminishing or varying his right to recover contribution from his co-sureties, renders it void. *Rudesill* v. *Jefferson County*, 85 Ill. 448; *Gillett* v. *Sweet*, 1 Gilm. 489.

The alteration was procured by the representative of the plaintiff below for the benefit of the ward and another surety, and in the absence of the defendant, and without his knowledge, and this renders the bond void as to him. *Vincent* v. *People*, 25 Ill. 500; *Lewis* v. *Payne*, 8 Cow. 73; *Burlingame* v. *Brewster*, 79 Ill. 516; 2 Parsons on Contracts, 716.

Though both parties to a bond agree to an alteration, yet the surety is thereby discharged. *Gardner* v. *Harbuck*, 21 Ill. 129; *Mix* v. *Vail*, 86 id. 40.

A penal bond can not be made valid by a subsequent oral assent of a surety. *Sans* v. *People*, 3 Gilm. 327.

Mr. C. A. Roberts, and Mr. N. E. Worthington, for the defendants in error:

An alteration, though material, by a stranger, or without any fraudulent intent, will not vitiate the written instrument. *Vogle* v. *Ripper*, 34 Ill. 105; *Elliott* v. *Blair*, 47 id. 342.

The subsequent assent or ratification of the surety to the alteration made the bond good as to him. *Stiles* v. *Probst*, 69 Ill. 382; *Goodspeed* v. *Cutler*, 75 id. 534; *Prettyman* v. *Goodrich*, 28 id. 330.

As to the alteration of the bond, reference is made to *City of Chicago* v. *Gage et al.* 95 Ill. 593.

Mr. Justice Dickey delivered the opinion of the Court:

Counsel for plaintiff in error contend that it was error to permit the bond to go in evidence after it was shown that it had been altered after it was executed by McIntyre, by the insertion of the words, "and Wm. S. Maus," in the body of the instrument, and by adding the words, "Wm. S. Maus, seal," at the bottom, below the original signatures. This position is not tenable. If the judge of the county court and Maus could not lawfully do what they did, and their action was unlawful, it is clear they could not, by any unauthorized act of theirs, deprive the minor of the security which she had in the original bond, and in such case she had the right to proceed upon the original bond as though it had not been altered. If the proceeding be regarded as a regular one, authorized by law to be done as it was done, then she had a right to treat the bond as that of all the sureties named in the bond after it was altered. This action, by the abstract, seems to have been brought against McIntyre alone. The statute authorizes this to be done.

Defendant offered, upon the trial, to prove that Alexander, on April 2, 1875, as such guardian, lent to W. S. Maus $1000 of the money of his ward, and took from Maus his note for that amount, payable thirty months after date, to Alexander, as such guardian, with interest at the rate of ten per cent, and that the payment of the same was secured at the time of the loan by a mortgage upon real estate in that county, which was of such value as to be, and was at the time, ample security for that amount, and also to prove that

Maus, at the time of the loan, was solvent to an amount larger than $1000; and also offered to prove, by the oral testimony of the then judge of the county court, that the loan was made at the time with his knowledge and consent, and by his approval. The note and mortgage were produced and offered as evidence. All this proof was rejected by the circuit court, and defendant excepted. This, it is insisted, was error. At common law it was the duty of the guardian to loan the money of his ward, (not needed for the present use of the ward,) and keep it loaned at interest for the benefit of the ward. This was to be done carefully and prudently. If the guardian kept such moneys in his possession without use, when by the exercise of ordinary care he might prudently have put the same at interest, he was chargeable with interest upon the same. If he loaned with prudence, and losses occurred, he was not answerable for losses not attributable to his fault. Our statute, however, provides that "it shall be the duty of the guardian to put and keep his ward's money at interest upon good security, *to be approved by the court*, or invest the same in United States bonds, or other United States interest-bearing securities. * * * Loans for large amounts shall be upon real estate security, * * * provided the same *may be extended* from year to year *without the approval of the court.*" Were it not for this proviso, it might be plausibly suggested that the primary provision, that the security should be approved by the court, is merely directory; but when it is said that such loans *may be extended* without such approval, it is necessarily implied that the original loan by the guardian must be made with the approval of the court. This being the mandatory requirement of the statute, the guardian making such loan without compliance with the statute makes the same at his own risk, and must be treated as having undertaken to assume the position of a guarantor. As such, after the maturity of the loan he may be held (in accounting to the ward) to answer for the money

so loaned. Of course, on payment to the ward the guardian may avail himself of the proceeds of the loan, if any, to his own use.

The county court is a court of record, having a clerk and a seal. The proceedings of such a court can only be shown by its record, and can not lawfully be proven by parol. If such an order of approval was in fact made, but not recorded, the only remedy is by an application to that court, in apt time, and upon notice and proper proof, to have its record amended or completed. We think the ruling of the circuit court on this question was right. The law has thrown about the interests of wards certain safeguards, and it is the duty of courts to maintain them.

It is next objected, that before an action of this kind against the surety can be maintained, it is necessary that the account of the guardian be first adjusted in the county court, and the true balance ascertained, where the commissions to which the guardian may be entitled can only be properly adjusted. By sec. 13, chap. 103, Rev. Stat. 1874, p. 730, it is enacted, as to bonds of guardians, that where the condition of such bond shall be violated, suit may be instituted on such bond, and prosecuted to final judgment against any one or more of the sureties severally, without first establishing the liability of the principal by obtaining judgment against him alone, and in such suits it shall not be necessary to a recovery that a *devastavit* should have previously been established against the principal in the bond. It results from this enactment, and from sec. 21, of chap. 110, (Practice,) that in an action like the present, for the purposes of this suit, the door is thrown open in the circuit court, upon the trial, for the adjustment of the accounts of the guardian, so as to fix the true amount of the damages.

We find no sufficient cause for the reversal of the judgment of the circuit court. The judgment of the Appellate Court is therefore affirmed.

Judgment affirmed.

Syllabus. Statement of the case.

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Indianapolis and St. Louis Railroad Company

v.

Daniel Morganstern.

At Springfield, June Term, 1882.

Agency—*use of corporate seal—presumption.* Where an appeal bond purporting to have been executed in the name of a railroad company by its general attorney, has the seal of the corporation attached, the presumption will arise that the person using the seal had authority to do so.*

Appeal from the Appellate Court for the Third District.

This is an appeal by the railroad company, the appeal bond being signed, "Indianapolis and St. Louis Railroad Company, by John T. Dye, General Attorney," with the seal of the corporation attached.

* Where it is recited in the body of an appeal bond given on appeal by a private corporation, that the company by its corporate name had entered into the obligation, and the bond is signed by the president and secretary of the company, and sealed with its corporate seal, that will be a sufficient execution of the bond in the name of the corporation. *Bills et al.* v. *Stanton*, 69 Ill. 51.

An appeal bond copied into the record, purported to have been executed by the Illinois Central Railroad Company, by an attorney in fact, with a scrawl attached,—it was held, on a motion to dismiss for want of the corporate seal, that the court did not know, judicially, that the company had a seal other than the scrawl such as appeared in the record. *Illinois Central Railroad Co.* v. *Johnson.* 40 Ill. 35.

In copying into the transcript of a record an appeal bond purporting to have been executed by a corporation, the corporate seal, if attached thereto, may be represented by a scrawl; a *fac simile* of the seal or device can not be made in the copy. Ibid.

Where an appeal bond, purporting to have been executed by an attorney in fact, was approved by the court from which the appeal was taken, it will be presumed there was before that court sufficient evidence of the authority of the attorney to execute the bond in behalf of his principal. Ibid.

In *Cromwell* v. *March*, Breese, (Beecher's ed.) 326, a *supersedeas* bond was executed by "Murray McConnel, attorney for the plaintiff." The *supersedeas* was quashed for the reason it did not appear that McConnel was authorized to sign the bond as attorney. But it was held in *Campbell* v. *The State Bank*, 1 Scam. 423, where a *supersedeas* bond purported to have been executed by a person as attorney in fact, in the name of his principal, and the authority of the attorney did not appear, this court would presume that the attorney had authority to execute the bond unless his authority was questioned by affidavit.

Syllabus.

Messrs. CRAIG & CRAIG, for the appellee, now move the court to dismiss the appeal on the ground the appellant corporation does not appear to have had its corporate name attached to the appeal bond by any person having authority to sign the same.

SCHOLFIELD, J.: The bond appears to have been executed under the seal of the corporation. This raises the presumption that the person using the seal had authority to do so. There is no attempt to impeach the authority, nor is it claimed the seal of the corporation has been improperly used.

Motion denied.

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76a 636

DANIEL SAPP

v.

MATILDA WIGHTMAN.

Filed at Springfield March 28, 1882—Rehearing denied June Term, 1882.

1. LIEN *of a decree—on lands in a different county.* The lien of a decree being limited by the statute in its territorial extent the same as that of a judgment at law, does not extend to lands of a defendant situate in a county other than that in which the decree was rendered, and the court rendering the decree has no power to extend its lien beyond the limits of the county, by declaring it shall be a lien on lands in such other county.*

2. SAME—*effect of section 6 of the Divorce act.* The power to make a decree for alimony a lien upon lands out of the county, is not conferred by section 6 of the Divorce act, which gives the court power to "enforce payment of alimony by causing the defendant to give security for the payment thereof, *or in any other manner* consistent with the rules and practice of the court." This implies, only, that resort may be had to the known modes under the rules of practice for enforcing writs, orders and decrees, such as sequestration, attachment for contempt, etc., or to the statutory method of creating a lien upon lands within the court's jurisdiction.

*As to the mode by which the lien can be extended to lands in another county, under the act of 1874, see *Yackle* v. *Wightman*, *post*, p. 169.

Statement of the case.

3. SAME—*on change of venue in suit for divorce—giving alimony in lieu of dower—effect as to extent of lien.* The fact that a suit for a divorce and alimony is brought in one county, and taken by change of venue to another, will not give the decree of the court in the latter county any more effect, as a lien upon land in the county where the bill was originally filed, than if it had been brought in the court in which the decree was entered, nor will the fact that alimony is decreed to be taken in satisfaction of dower, make any difference as to the lien of the decree.

3. NOTICE—*lis pendens—as to lands.* The commencement and pendency of a bill for divorce, which merely sets forth the defendant's lands as affecting the amount of alimony to be allowed, but asserts and seeks no right in respect to them, is no notice *lis pendens* to affect the rights of purchasers from the defendant.

APPEAL from the Circuit Court of Tazewell county; the Hon. N. M. LAWS, Judge, presiding.

This was a suit in ejectment, brought by Matilda Wightman, against Daniel Sapp and Oliver Goodwin, in the circuit court of Tazewell county, to the September term, 1881, to recover possession of the west half of the south-west quarter of section 24, town 24 north, range 6 west of the third principal meridian, in Tazewell county, Illinois, wherein the plaintiff, on trial by the court without a jury, recovered, and the defendant Sapp appealed.

It was admitted by the parties to the suit, upon the trial, that John Wightman owned the land in controversy in fee simple on March 22, 1859. Appellee, Matilda Wightman, to recover in the action, relied entirely upon a title she claimed to have derived by conveyance of the premises, from the master in chancery of Tazewell county, to her, as the assignee of a purchaser of the same at a sale thereof, made by such master under a decree rendered by the circuit court of Peoria county, Illinois, on March 22, 1859, in a suit for a divorce, brought by her against her husband, said John Wightman. The sale was made by said master on November 22, 1879, upon the affidavit of Matilda Wightman, presented to him, in which it was stated that eight semi-annual

Brief for the Appellee.

Messrs. PRETTYMAN & SONS, for the appellee:

The assignee of a judgment debtor, or one subject to a lien for alimony, takes the land as the debtor had it, and the lien may be enforced against the property in his hands the same as against the lien debtor. *Kruse* v. *Scripps*, 11 Ill. 90; *Yates* v. *Benard*, 38 id. 297.

On the sale of land under a decree which is made a specific lien thereon, and its purchase and conveyance to the lien-holder, the lien is merged in the fee, and the purchaser is entitled to recover against the debtor, or any person purchasing from him since the creation of the lien. *Talcott* v. *Draper*, 61 Ill. 56; *Prescott* v. *Fisher*, 22 id. 390; *Carroll* v. *Pollard*, 24 id. 20; 1 Washburn on Real Estate, 65.

The statutes then in force authorized the courts in granting a divorce to create liens upon real estate for installments of alimony. Acts 1859, p. 48, incorporated in Rev. Stat. 1874, p. 422, chap. 40, secs. 18, 20; Rev. Stat. 1874, chap. 22, sec. 45, and chap. 41, secs. 39, 40; *Foote* v. *Foote*, 22 Ill. 429.

That the pendency of a bill for divorce and alimony is notice *lis pendens* of the equities of the complainant to any subsequent purchaser from the defendant: *Vanzant* v. *Vanzant*, 23 Ill. 543; *Errissman* v. *Errissman*, 25 id. 138; *Armstrong* v. *Armstrong*, 35 id. 109; *Draper* v. *Draper*, 68 id. 18.

A decree on change of venue may be filed in the county from which the venue is taken, with the clerk of the court from which the venue is changed, and from the date of such filing it will have the same effect as if originally entered there. Rev. Stat. 1874, chap. 146, sec. 34.

An execution is not necessary to be issued on a decree which authorizes the master to sell, to make the decree a lien. The decree is authority to the master. *Karns* v. *Harper*, 48 Ill. 527; *Dinet* v. *Eigenman*, 80 id. 274; *Amsby* v. *People*, 20 id. 159; Rev. Stat. 1874, chap. 40, secs. 17, 18, 20, and chap. 22, secs. 45, 47.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The validity of plaintiff's title depends upon the force and effect of the decree rendered in the circuit court of Peoria county on March 22, 1859, as being a lien upon this land in Tazewell county. If it was not a lien upon such land situated in another county than that in which the decree was rendered, then the deed from John Wightman to William Wightman, of March 21, 1866, conveyed to the latter the full title to the land, unincumbered by any lien of the decree, and there was no interest left in the land for the master's deed to the plaintiff, of February 26, 1881, to operate upon and convey. Was, then, the decree a lien upon this land in another county?

The law in force at the time the decree was rendered was: "A decree for money shall be a lien on the lands and tenements of the party against whom it is entered, to the same extent and under the same limitation as a judgment at law." Rev. Stat. 1845, p. 95, sec. 14. And by sec. 45, p. 98: "All decrees given in causes in equity in this State shall be a lien on all real estate respecting which such decrees shall be made, and whenever, by any decree, any party in a suit in equity shall be required to perform any act other than the payment of money, or to refrain from performing any act, the court may in such decree order that the same shall be a lien upon the real or personal estate, or both, of such party, until such decree shall be fully complied with, and such lien shall have the same force and effect, and be subject to the same limitations and restrictions, as judgments at law." As to the lien of judgments at law the provision was: "All and singular the lands, tenements and real estate of any person against whom any judgment has been or hereafter shall be obtained, either at law or in equity, shall be liable to be sold upon execution to be issued upon such judgment, etc., and the said judgment shall be a lien on such lands, tenements and real estate from the last day of the term of court in which the same may be rendered, for the period of seven

years: *Provided*, that execution be issued at any time within one year on such judgment," etc. Same, p. 300, sec. 1. And as to a writ of attachment, or a writ of execution, issued from the circuit court of one county to any sheriff or other officer of another county, it was provided, that it should be the duty of the officer making such levy to make a certificate thereof, and file the same in the recorder's office of the county where such real estate was situated, and that until the filing of such certificate such levy should not take effect as to creditors, or *bona fide* purchasers without notice. Same, p. 305, sec. 25. And by section 27 it is provided that the certificate shall be recorded in a book to be kept for that purpose.

It will thus be seen that by statute a decree for money is made a lien on lands to the same extent, and under the same limitation, as a judgment at law, and that when, in a cause in equity, the court, in its decree, orders that the same shall be a lien upon real estate, the lien shall have the same force and effect, and be subject to the same limitations and restrictions, as judgments at law.

Although the lien of a judgment is given by the statute, in terms the most general, against "all and singular the lands, tenements and real estate" of the judgment debtor, the lien has ever been held by the decisions of this court to be limited in extent to the territorial jurisdiction of the court rendering the judgment. Thus, in *Bustard* v. *Morrison*, 1 Scam. 236, the court say: "The statute makes judgments of the circuit court a lien upon all the lands of the defendant within its jurisdiction. * * * The judgment of a court creates no lien upon land beyond the limit of its jurisdiction, to-wit, the county in which such judgment is rendered." In *Kinney* v. *Knoebel*, 51 Ill. 119, it is said: "It is the settled law of this court that the lien of a judgment upon real estate is only co-extensive with the limits of the county in which it is rendered," and see *Durham* v. *Heaton*, 28 Ill. 264; *Ewing* v. *Ainsworth*, 53 Ill. 465.

The only way, under the statute then in force, of obtaining a lien upon land in Tazewell county under a judgment in the circuit court of Peoria county, would have been by the levy of an execution upon the judgment, and filing a certificate of the same in the recorder's office of Tazewell county, and it is the levy of execution, not the judgment or decree, that creates the lien in such case on land in another county. *Tenney* v. *Hemenway*, 53 Ill. 97. The case declares it not the policy of the law to favor secret liens.

The lien of a judgment, then, of the circuit court of a county not extending beyond the boundary of the county, and the lien of a decree for money, or for the performance of any act other than the payment of money, being by the statute limited in its extent the same as the lien of a judgment at law, (*Eames* v. *Germania Turnverein*, 74 Ill. 56,) it follows that the decree of the circuit court of Peoria county was no lien upon lands in Tazewell county. That court had no power to extend the lien of a decree beyond the territorial boundary to which it was limited by law, and by declaration to that effect make its decree a lien upon lands situated in another county. The liens created by judgments and decrees of the circuit courts in this State are purely statutory. *Tenney* v. *Hemenway*, *supra*. The power can not be derived, as is supposed, from section 6 of the chapter entitled "Divorces," Rev. Stat. 1845, p. 197, sec. 6, giving to circuit courts the power to "enforce payment of alimony by causing the defendant to give security for the payment thereof, or in any other manner consistent with the rules and practice of the court." This general power means no more than that resort may be had to the known modes, under the rules and practice of the court of chancery, of enforcing obedience to writs, orders and decrees, as, sequestration, attachment for contempt, etc., or the statutory method of creating a lien on lands within the court's jurisdiction. It does not authorize the creating of a lien upon real estate outside of the ter-

ritorial jurisdiction of the court. That would be in contravention of the express terms of the statute that the lien of decrees shall be of the same extent, and subject to the same limitations and restrictions, as that of judgments at law.

A very proper mode of security of payment in this case would have been as suggested with reference to alimony made a lien on land, in *Errissman* v. *Errissman*, 25 Ill. 136: "And for the purpose of giving notice of the lien, it would have been proper to have required a mortgage to be given for the payment."

The bill in the divorce suit set forth that the defendant was the owner of the premises in controversy, and various other specifically described tracts of land in Tazewell county and other counties in the State; that said lands and defendant's personal property were worth $50,000. The bill prayed for a divorce and alimony. The decree ordered that the alimony allowed by it should be in satisfaction of dower.

It is urged by appellee's counsel that the decree ought to create the lien it professes to do, because the alimony is given in lieu of dower, and that the defendant had no power, by taking a change of venue, to deprive the complainant of any equity or right in the premises to which she would have been entitled had there been no change of venue, and that purchasers of the land after the rendition of the decree should stand affected in their rights by the decree as from the time of the commencement of the suit, after the manner that *pendente lite* purchasers are affected in their rights from the time of the service of the subpœna in a suit. Had the bill here set up some specific claim of right in this land, and the decree established it, we need not say what might have been the effect of the decree in the respect suggested. But there is no such case here. Although the lands are named in the bill, no right is asserted in respect to them, nor are they, or any part of them, asked to be assigned for alimony, or any other relief asked in regard to them,—they are men-

tioned for the apparent purpose of showing the amount of defendant's property, as bearing upon the sum to be allowed for alimony. The decree allows as alimony a sum of money,—$500 a year,—and orders merely that the decree shall be a lien upon the lands as security for the payment of the alimony. Where land is no more involved than this in a legal proceeding, the commencement or pendency of the suit furnishes no notice to affect the rights of purchasers. We do not see that the circumstance that the suit for divorce was commenced in the circuit court of Tazewell county, and taken by change of venue to the Peoria county circuit court, gives to the decree of the latter court any more effect as a lien upon land in Tazewell county than it would have had if the suit had been originally instituted in the circuit court of Peoria county. Nor do we perceive that the alimony being decreed to be in satisfaction of dower, makes any difference as to the lien of the decree.

There is now a statute which meets such a case as that of plaintiff, it providing that where there has been a judgment or decree in any civil case in which the venue has been changed, a transcript of the judgment or decree may be filed in the office of the clerk of the court where the suit was instituted, and that the clerk shall enter the same in his judgment docket, and execution may issue thereon, and the same shall, from the filing of such transcript, have the same operation and effect as if originally recovered in such court. Rev. Stat. 1874, p. 1097, sec. 34. But this statute was too late to help the case of plaintiff, the passage of the statute being in 1874, and the rendition of the decree in 1859, and the sale and conveyance by John Wightman to William Wightman in 1866.

The judgment of the circuit court is reversed and the cause remanded.

Judgment reversed.

Mr. JUSTICE SCOTT dissenting.

Syllabus.

EDGAR T. SCHMIDT *et al.*

v.

MARY E. SINNOTT.

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112a 86

Filed at Springfield March 28, 1882—Rehearing denied June Term, 1882.

1. EVIDENCE—*cross-examination—as to enmity of witness towards the party against whom he had testified.* On the cross-examination of one of the plaintiff's witnesses, he was asked if there had not been a feud or quarrel between his family and one of the defendant's family, which, on objection, was disallowed, the court remarking to counsel that they might inquire as to the witness' own feelings. The witness had already stated that he had not spoken a word to such defendant since he was a little boy, though his feelings toward him were perfectly friendly: *Held*, that while under the latitude of cross-examination it would not have been improper to allow the question, there was no such error in disallowing it as to call for a reversal. The witness had already stated enough to show the relations between the parties, and that was all the excluded question could have properly elicited.

2. INSTRUCTION—*as to the use of "due and proper care"—whether submitting a question of law.* An instruction in an action for a personal injury growing out of the alleged negligence of the defendant, which submits to the jury the question whether the plaintiff, at the time of the injury, was exercising "*due and proper care*," is not open to the objection that it submits a question of law to the jury.

3. The words "due and proper care," and "ordinary care," are not unlike in their character in such connection, and while it is the province of law to determine in the abstract what is "ordinary care" as well as what is "due care," yet where a plaintiff bases his right to recover for an injury received at the hands of the defendant, in part upon an allegation that at the time of receiving such injury he was exercising due care, and such allegation is traversed by the defendant's plea, the issue thus formed presents a question of fact for the determination of the jury, precisely in the same manner as if the words "ordinary care" had been used.

4. It can not be said that an instruction framed in the very words of the issue is improper, as submitting to the jury a mere question of law, which simply tells the jury, in order to recover it must appear from the evidence that the plaintiff was exercising due and proper care at the time of receiving the injury.

5. SAME—*former decision.* If some of the expressions used in the case of *Stratton* v. *Central City Horse Ry. Co.* are in conflict with these views, they must be regarded as modified accordingly.

Briefs of Counsel.

6. SAME—*explanation of terms, etc.* It is often important and necessary for the court to explain to the jury the meaning of technical terms not in common use, or to define the meaning of words or phrases in a contract, statute, or the like. And it is proper for the court, on its own motion or on request, to define specifically what is meant in an instruction by the words "due and proper care," though there is no necessity for doing so except upon request.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Adams county; the Hon. JOHN H. WILLIAMS, Judge, presiding.

Mr. WM. W. BERRY, for the appellants:

In an action to recover damages for injuries sustained by a person who has been run over in the street by a party driving a horse and buggy, it is error to instruct the jury that the person injured may recover if he was using due and proper care, and if, by the use of ordinary and proper care by the party driving, the injury could have been avoided. *Stratton* v. *Central City Horse Ry. Co.* 95 Ill. 25.

Such an instruction leaves the jury to determine the question of law as to what is proper care, or as to what degree of care the law requires in such case, and they are not confined to the question whether the plaintiff used ordinary care.

The feelings of a witness towards the parties, and the motives and temper governing or influencing him in the particular matter or transaction, are proper subjects of inquiry, and are not regarded as collateral to the issue. *Nation* v. *People*, 6 Parker, 258; *Howell* v. *Ashmore*, 22 N. J. L. 261; *Hansell* v. *Erickson*, 28 Ill. 257; 1 Wharton on Evidence, sec. 408.

MESSRS. CARTER, SIBLEY & GOVERT, for the appellee:

Exception is taken to plaintiff's third instruction, although the attention of the court below was not called to the objection here urged. It is claimed that "proper care" is a question of law, on the authority of *Stratton* v. *Central City Horse*

Ry. Co. 95 Ill. 25. The charge in that case was so different from this, that it affords no reason for considering the instruction in this case as misleading, and the words "due and proper care" may be rejected as surplusage, and the instruction still be good.

But, taking all the instructions together, it is difficult to see how the defendants were prejudiced by this instruction. See *Haywood* v. *Merrill*, 94 Ill. 349; *Lawrence* v. *Hageman*, 56 id. 68; *Toledo, Wabash and Western Ry. Co.* v. *Ingraham*, 77 id. 309; *Durham* v. *Goodwin*, 54 id. 469; *Van Buskirk* v. *Day*, 32 id. 260; *Morgan* v. *Peet*, 32 id. 281; *Latham et al.* v. *Roach*, 72 id. 179; *Stowell* v. *Bragh*, 79 id. 525.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

Edgar T. and William G. Schmidt, on the afternoon of the 1st of September, 1879, while driving along Jersey street, in the city of Quincy, in a one-horse buggy, at a somewhat rapid rate, suddenly came in contact with Mary E. Sinnott, a small child, who was at the moment attempting to cross the street. She was knocked down, the horse and buggy passing over her, and was so disabled as to be confined to her bed and room most of the time for about a month, and had not fully recovered at the time of the trial, over a year afterwards. Indeed, the evidence tends to show that she is permanently injured. To recover for the injuries thus occasioned, she, by her next friend, Thomas Sinnott, instituted an action of trespass in the circuit court of Adams county, against the two Schmidts, where the same was tried before the court and a jury, resulting in a verdict and judgment in her favor for $1140, which, on appeal to the Appellate Court for the Third District, was affirmed, and the Schmidts, by further appeal, bring the case here for review.

The declaration charges that the defendants, "not regarding their duty to govern said horse in a careful manner, did so negligently and recklessly drive said horse as to cause the

same to run over the plaintiff then and there attempting to cross said street in a proper and careful manner, with great force and violence, thereby inflicting upon the plaintiff great bodily injury," etc. The facts here charged, including the negligence and recklessness of the defendants and the alleged proper care on the part of the plaintiff, are put directly in issue by the defendants' plea of not guilty, and the cause was tried upon this issue, resulting adversely to appellants; and the conclusion thus reached, so far as the facts are concerned, must be accepted as a finality, as we are not permitted to review them here.

We start out, then, with the fact conceded that while the plaintiff was attempting to cross the street "in a proper and careful manner," she received the injuries complained of, through the negligence and recklessness of the appellants. It only remains, therefore, to inquire whether the trial court committed any error in law which may have contributed to the result stated, for which the Appellate Court should have reversed the judgment.

On the trial of the cause, Dr. Koch, a witness on behalf of plaintiff, was asked this question: "Has there not been a feud or quarrel between your family and Dr. Schmidt's family?"—which, on objection, was held improper, and disallowed, the court remarking to counsel at the time they might inquire as to the witness' own feelings,—and it is claimed this was error. While we do not think, under the latitude of cross-examination, there would have been anything improper in allowing the question, yet questions of this character, where the matter sought to be elicited does not directly affect the controversy, lie so much in the discretion of the trial court that courts of review are not inclined to interpose, except in extreme cases, where there is just reason to believe injustice has been done by reason of an improper exercise of such discretion. We think it clear, however, there was no such error in this case. The witness had already stated he

had not spoken a word to Dr. Schmidt, one of the defendants, since he was a little boy, though his feelings towards the defendants were perfectly friendly. These two facts clearly show the relations between the parties, and that is all the excluded question could properly have elicited.

It is also objected the court gave improper instructions on behalf of the plaintiff. The one chiefly complained of is plaintiff's third instruction, which is as follows:

"Even if the jury should believe from the evidence that the defendant was not, at the time of the injury complained of, driving at an unusual rate of speed, still, if they further believe from the evidence that the defendants did commit the injury upon the plaintiff, as charged in the declaration, while she was using due and proper care, and the defendants might, by using ordinary and proper care at the time, have avoided committing such injury, and that in consequence of a want of such reasonable and ordinary care on the part of the defendants the plaintiff received the injuries complained of, then the jury should find the defendants guilty, and assess the plaintiff's damages at such sum as they may think, from the testimony, will compensate her for the injuries so sustained by her, not to exceed the amount claimed in the declaration."

To avoid the possibility of doing counsel injustice in attempting to state the substance of their criticism of this instruction, we give it in their own words. It is as follows: "Instruction number three of this series authorizes a verdict for the plaintiff if she was 'using due and proper care' at the time of the accident, and when by 'using ordinary and proper care' the defendants might have avoided committing the injury. What is due and proper care, as the court says in *Stratton* v. *Cent. City Ry. Co.* 95 Ill. 25, is matter of law, and is to be ascertained and defined by the court. Such an instruction is an abdication of its functions by the court, and

submits problems of law to the jury which frequently tax the capacity of the ablest jurists."

The objection to this instruction, as we understand it, consists in the use of the phrase "using due and proper care." Had the framer of the instruction used the words "ordinary care," instead of "due and proper care," we presume the instruction would be unexceptionable to counsel. We confess we are unable to perceive the force of the criticism. It is the province of law to determine in the abstract what is ordinary care as well as what is due care, and there is no difference in the character of the two expressions, viewed from this standpoint. But where a plaintiff bases his right to recover for an injury received at the hands of the defendant, in part upon an allegation that at the time of receiving such injury he was exercising due care, and such allegation is traversed by the defendant's plea, the issue thus formed presents a question of fact for the determination of the jury, precisely in the same manner as if the words "ordinary care" had been used. To the unprofessional mind these terms would doubtless convey substantially the same meaning, and for all practical purposes, when applied to an actual case in court, they do amount to the same thing. Due and proper care simply means that degree of care which the law requires under a given state of circumstances, so that in every case where the measure of diligence is ordinary care, the exercise of such ordinary care would, within the meaning of the law, be using due care in that particular case, and so it would be in a case where the law exacts a higher degree of diligence. The exercise of this higher degree of diligence would, within the meaning of the law, be using due care or diligence under the circumstances of that case.

The term "ordinary care," when used in a general sense, without reference to the facts of any particular case, comes nearer expressing, perhaps, a definite measure of responsibility than the expression "due care," yet the degree of

diligence which it implies greatly varies according to the character of the circumstances to which it relates. A slight examination of the precedents, as found in Chitty and other standard authors, will show that in actions for personal injuries the expressions "due care," and "due and proper care," are uniformly used in charging the degree of diligence or care alleged to have been exercised by the plaintiff at the time of receiving the injury complained of; and in actions against carriers for loss of goods, and also for injuries to the person, the same terms are almost uniformly used in charging the degree of care which the carrier assumed, and also in assigning a breach of such undertaking. It is therefore clear that these terms are not only proper when thus used, but are technically correct, and where the allegations of a declaration thus framed are properly traversed, the questions whether the plaintiff did, and whether the defendant did not, exercise due and proper care, as charged in the declaration, are presented directly as questions of fact for the determination of the jury. So in the case before us, one of the plaintiff's material allegations, upon which an issue was formed and submitted to the jury, is, that at the time of the receiving of the injury she was using "due and proper care."

Upon what principle, then, can it be said that an instruction framed in the very words of the issue is improper, as submitting for the determination of the jury a mere question of law, which simply tells the jury, in order to recover it must appear from the evidence the plaintiff was exercising due and proper care at the time of receiving the injury? If the ground of the objection is the court should have inserted in the instruction the legal signification of those terms, the answer is, we know of no rule of law requiring it. The words are in common use, and are just as well understood by the generality of men as the words "in good faith," "without notice," "maliciously," "fraudulently," and the like. If instead of "due and proper care," the words "ordinary care"

had been used, it is not pretended that it would have been necessary to have inserted in the instruction the legal meaning of the latter terms, and if there is no such requirement as to them, upon what reasonable ground or theory can it be claimed any such necessity exists as to the words "due and proper care?" It could not seriously be contended for a moment there is any legal presumption that the jury would understand the legal signification of one set of terms and not the other. To require the court to insert the meaning of all the terms and expressions used in an instruction, to make it unobjectionable, would tend to utter confusion rather than aid the jury in arriving at a just conclusion with reference to the case before them. If it is necessary to explain the terms used in an instruction, would it not be equally necessary to explain the terms of the explanation? And if so, where would the matter stop?

It is often highly important, and even indispensable, for the court to explain to the jury the meaning of technical terms not in common use, or define the meaning of words or phrases used in a contract, statute, or the like, and even in the case before us it would have been altogether proper for the court, on its own motion or on the application of either of the parties, to have given an instruction specifically defining what was meant by "due and proper care," as applicable to the case in hand, but there was no absolute necessity for doing so unless such an instruction had been asked; nor was there any more reason or propriety, in the absence of such application, for giving such an instruction, than there would have been under like circumstances had the term "ordinary care" been used, for the reason, as we have already seen, there is no principle of law which requires one of these expressions to be explained to the jury more than the other. The views here expressed are fully sustained by a long line of decisions: *Miller* v. *Balthasser*, 78 Ill. 302; *Kerr* v. *Forgue*, 54 id. 482; *Chicago, Burlington and Quincy R. R. Co.* v. *Greg-*

ory, Admx. 58 id. 272; *Indianapolis and St. Louis R. R. Co.* v. *Evans*, 88 id. 63; *Schmidt, Admx.* v. *Chicago and Northwestern R. R. Co. et al.* 83 id. 405; *Indianapolis and St. Louis R. R. Co.* v. *Stables*, 62 id. 313; and if some of the expressions of the court in the case of *Stratton* v. *Central City Horse Ry. Co.* 95 Ill. 25, are in conflict with what is here said, they must be regarded as modified by the present opinion.

We have considered the instructions in this case very carefully, and have no hesitancy in saying that when considered as a whole, they presented the law of the case very fully and fairly to the jury—more so, really, than is generally the case. As man, when representing the highest state of culture and civilization, is conceded to be imperfect, it necessarily follows, on the principle a stream can never rise higher than its fountain, all his works are to some extent imperfect; and this principle extends to instructions as well as everything else. It is not to be expected they will be precisely accurate in every particular. It is sufficient if they are substantially so. The administration of the law is intended to be practicable, and to reverse cases and set aside the verdicts of juries merely because the highest degree of accuracy has not been attained in the preparation of the instructions, when the court can see substantial justice has been done, would not only be defeating the chief object of judicial investigations, but would bring the court into deserved disrepute.

The judgment will be affirmed.

Judgment affirmed.

Syllabus. Statement of the case.

JOSEPH YACKLE

v.

MATILDA WIGHTMAN.

Filed at Springfield March 28, 1882—Rehearing denied June Term, 1882.

1. LIEN—*of a decree on land out of county.* Without the aid of the statute, a judgment or decree of the circuit court is a lien only upon lands within the county in which the judgment or decree was rendered, and the court has no power to make its decree a lien upon lands of the defendant in another county, merely by a provision therein to that effect, as against an innocent purchaser.

2. SAME—*how a decree or judgment may be made a lien in another county.* To make a judgment or decree rendered in one county, on change of venue, a lien, under the act of 1874, upon the defendant's real estate in the county where the suit was brought, a transcript thereof must be filed with the clerk of the circuit court of the latter county, and an entry of the same made in the judgment docket, after which such judgment or decree will have the same effect as if rendered in the court in which the suit was originally instituted. The recording of a copy of such decree in the book of the record of deeds, in pursuance of a direction in the decree, will not be regarded as a compliance with the statute, and will create no lien upon the defendant's lands as against an innocent purchaser for value.

APPEAL from the Circuit Court of Tazewell county; the Hon. JOHN BURNS, Judge, presiding.

This was a suit in ejectment, brought by Matilda Wightman, against Joseph Yackle, in the circuit court of Tazewell county, to the May term, 1881, to recover the possession of the north-east quarter of section 25, town 25 north, range 5 west of the third principal meridian, in Tazewell county, Illinois, wherein the plaintiff recovered, and the defendant appealed.

It was admitted, on the trial, that John Wightman was the owner in fee of the premises in controversy on June 16, 1858, and that both parties claimed from him as a common source of title. Appellee, Wightman, to recover in the action, relied upon a title she claimed to have derived by deed of

the premises from the master in chancery of Tazewell county to her, as the assignee of the purchaser of the same at a sale thereof made by such master under a decree rendered by the circuit court of Peoria county, Illinois, on March 22, 1859, in a suit for a divorce brought by her against her husband, said John Wightman. The sale was made by said master on November 22, 1879, upon the affidavit of Matilda Wightman presented to him, in which it was stated that eight semi-annual payments of alimony, of $250 each, for the years 1876, 1877, 1878 and 1879, due on the first days of January and July of each of said years, by the provisions of said decree, from John Wightman, were unpaid, and requesting the master to collect the same. At the sale one James Haines, Jr., bid off the premises in controversy, and another tract of eighty acres, all situated in Tazewell county, for $2327.10; and it is recited in the deed that Haines had assigned the certificate of sale from the master to Matilda Wightman, who, on February 26, 1881, received the master's deed purporting to convey to her the premises in controversy, and the eighty acres.

The suit for divorce was commenced June 16, 1858, in the circuit court of Tazewell county, by Matilda Wightman against John Wightman. The cause was taken, by change of venue, to the circuit court of Peoria county, and the latter court, on March 22, 1859, rendered a final decree. The decree provides that $500 per annum be allowed as alimony to the complainant, Matilda Wightman, in installments of $250 each, to be paid on the first day of January and first day of July, commencing January 1, 1860, and payable at the expiration of every six months thereafter during her natural life, the decree declaring that it was made a specific lien upon the premises in controversy and certain other described tracts of land, all in Tazewell county, and that in the event of the defendant failing to pay the complainant any part of said sum of money in the manner and at the

time mentioned in the decree, then the master in chancery of Tazewell county was ordered, on the application of the complainant, stating the fact of such failure by affidavit, to proceed to advertise and sell the tracts of land described in the decree, or any part thereof, to the highest bidder, for cash in hand, to raise the amount which might be then due the complainant as alimony, and to make sale in like manner, from time to time afterward, upon like default of payment.

It was ordered that the decree be recorded in Tazewell county, and that from and after its rendition the defendant be enjoined from selling or conveying said lands, except subject to the lien thereby created upon the same. This decree, rendered March 22, 1859, was recorded March 24, 1859, in the book of deeds in the recorder's office of Tazewell county. The master's deed to Matilda Wightman, dated February 26, 1881, was recorded in such office February 28, 1881.

The defendant, to show right of possession in himself, introduced in evidence a warranty deed of conveyance of the premises in controversy, together with lot 6 and the east half of lot 10, in block 64, in Pekin, in this State, from John Wightman and wife to Job Newton, for the expressed consideration of $10,000, the deed being of the date of December 23, 1875, and recorded December 29, 1875, and introduced a lease of the premises from Newton to defendant.

The bill in said suit for divorce alleged that the defendant was the owner of the premises in controversy, and various other tracts of land in Tazewell county and other counties in the State, and prayed for a divorce and alimony. The court below instructed the jury that the Peoria county circuit court had the power to make the decree a specific lien on any land of the defendant, named in the bill, situated in Tazewell county, and that the decree, upon its rendition, became a lien upon the premises in controversy, and that the master's deed to plaintiff conveyed to her the fee simple title to the

premises, entitling her to them as against any grantee from John Wightman subsequent to the date of the decree.

Mr. N. W. GREEN, and Mr. WM. DON MAUS, for the appellant:

The lien of a decree for the payment of money for alimony was subject to the same restrictions, under section 14 of the Chancery Code of 1845, as judgments at law. *Eames et al.* v. *Germania Turnverein*, 74 Ill. 56.

A judgment was a lien only upon the lands of the defendant in the county where it was rendered, and not beyond. *Bustard* v. *Morrison*, 1 Scam. 236; *Durham* v. *Heaton*, 28 Ill. 264; *Kinney et al.* v. *Knoebel et al.* 51 id. 119; *Ewing et al.* v. *Ainsworth*, 53 id. 465; *Hart* v. *Wingart*, 83 id. 282.

The circuit court of Peoria county could not create a lien upon lands in Tazewell county by its decree, and except by issuing an execution, and making a levy and filing the same, such lands could not, under the law and decisions, be made subject to the lien of such decree. *Cornwell* v. *Watkins*, 71 Ill. 492; *Worcester National Bank* v. *Cheeney*, 87 id. 607.

Messrs. PRETTYMAN & SONS, for the appellee:

This case is not like a judgment or simple decree for the payment of money, and therefore the statutes and authorities referred to by appellant to show that the lien of a judgment or decree in a county is bounded by the county in which it is rendered, and can be made a lien in another county only by an execution levied there, has no application here.

Under the statute in force at the time this decree was rendered, the court was authorized to make its decree for alimony in a divorce suit a lien on the defendant's lands. Acts 1859, p. 28; Rev. Stat. 1874, p. 422, secs. 18, 20. See, also, *Wightman* v. *Wightman*, 45 Ill. 174.

The bill for divorce and alimony created a lien on the premises, and they became subject to the decree for all the

equities established by the decree, and a subsequent purchaser is affected by notice. *Vanzant* v. *Vanzant*, 23 Ill. 543.

The master's deed, where the decree is made a specific lien, relates back to the date of the decree, and becomes a superior title to all grants and conveyances of the defendant in the decree made after the date of the decree.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The plaintiff's claim of title is by master's deed, dated February 26, 1881, and the defendant's landlord's (Newton) claim of title is by deed dated December 23, 1875, and recorded December 29, 1875, a period of more than five years anterior to the date of plaintiff's deed. This fixes Newton's as the paramount title, unless at the time of the sale and conveyance from John Wightman to Newton, December 23, 1875, the premises were subject to the lien of the decree as against Newton.

In the case of *Sapp* v. *Wightman*, decided at the present term, (*ante*, p. 150,) a suit in ejectment, where the title to the other tract of eighty acres embraced in this same master's deed was involved, we considered the effect of this decree as being a lien upon these lands in Tazewell county, and determined that it was not a lien upon them; that the lien of a judgment or decree of the circuit court of a county is a lien only upon lands within its territorial jurisdiction, and no lien upon lands without the county in which such judgment or decree is rendered, and that the court had no power to make its decree a lien upon lands beyond the boundary of its territorial jurisdiction. That decision, however, was made without reference to the effect of the statute of 1874, which provides for filing the transcript of a judgment or decree, in a case where the venue has been changed, in the clerk's office of the county from which the change of venue was taken. The sale and conveyance from John Wightman, there, having

been in 1866, that case was not affected by this statute, passed afterwards, in 1874. But in the present case the sale and conveyance from Wightman was in 1875, after the passage of that statute, hence there is the additional question to be considered in the present case of the bearing of that statute.

The statute is: "Upon the entry of any judgment or decree in any civil case in which the venue has been changed, it shall be lawful for the party in whose favor the judgment or decree is rendered, to file in the office of the clerk of the court where the suit was instituted, a transcript of such judgment or decree, and said clerk shall enter the same in his judgment docket, and execution may issue thereon, and the same shall, from the filing of such transcript, have the same operation and effect as if originally rendered in such court." Rev. Stat. 1874, p. 1097, sec. 34. Without this statute, and the doing of what was therein prescribed, the decree could not be made a lien upon lands in Tazewell county as against an innocent purchaser for value.

But no step whatever was taken thereunder after the passage of the act. True, before the passage of the act, and soon after the rendition of the decree, in obedience to its express direction, the decree was recorded in the book of record of deeds in the recorder's office of Tazewell county. This was merely to comply with the decree. The law did not provide for the decree to be so recorded, and the recording of it affected nobody with notice of the decree. The records of the clerk's office and the judgment docket is where, under the law, intending purchasers of land are to look for judgments and decrees against it, not the records of the recorder's office. And, although the clerk of the circuit court is *ex officio* recorder of the county, this recording in 1859 can not be accepted as a substitute for, and to stand in the place of, the filing under the statute of 1874, of a transcript of the decree in the office of the clerk of the circuit court, and the

clerk's entry of the same in his judgment docket. Had the complainant in the divorce suit proceeded, under this statute of 1874, and filed a transcript of the decree in the clerk's office of the circuit court of Tazewell county, the clerk, as it was his duty to do, would have entered the same in his judgment docket, and this would have affected purchasers of the land with notice of the decree, and it would have been a valid lien upon the land, under that statute.

The requisite proceeding, then, not having been taken, under this statute of 1874, to give to the decree the same operation and effect as if originally rendered in the circuit court of Tazewell county, we find that there was no lien created upon the land under and by virtue of this statute of 1874, and hence, that the purchaser from John Wightman (Newton) took by his conveyance from Wightman the title in fee, unaffected by any lien of this decree of the Peoria county circuit court. It follows that the instructions to the jury were erroneous, and the judgment will be reversed and the cause remanded.

Judgment reversed.

Mr. JUSTICE SCOTT dissenting.

THE CHICAGO THEOLOGICAL SEMINARY

v.

ASAHEL GAGE.

Filed at Ottawa May 19, 1882.

1. APPEAL *from trial court to this court—in what cases.* Since the amendatory act of 1879, amending section 88 of the Practice act, all cases involving a franchise, freehold or the validity of a statute, without regard to whether they are cases in chancery or at law, are required to be brought directly from the trial court to this court, and not to the Appellate Court.

2. SAME—*whether a freehold is involved.* A freehold is involved in all cases where real estate is claimed under a deed regular on its face, and

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Statement of the case.

purporting to convey title, which is sought to be set aside by an adverse claimant as a cloud upon the title of the latter, and in such cases an appeal lies directly to this court from the trial court.

3. BILL TO FORECLOSE—*determining adverse legal titles—former decision.* On bill in chancery to foreclose a mortgage, the complainant also sought to have set aside a tax deed for the premises embraced in the mortgage, as an alleged cloud upon the title of the mortgagee. The bill made the alleged owner of the tax deed a party defendant, averring that his claim of title was under a tax sale which was void, and that whatever interest he had in the premises was subsequent and subordinate to the rights of the mortgagee. For want of any answer by that defendant the bill was taken as confessed against him, and a final decree was entered annulling and setting aside his tax deed as a cloud upon complainant's title. Upon the question as to the right of the court below to entertain the bill at all, in so far as it concerned the alleged claim under the tax deed, this court said there seemed to be a misapprehension as to the true scope and effect of the decision in *Gage* v. *Perry*, 93 Ill. 176, where it was held that a court of equity had no right, upon a bill to foreclose a mortgage, to consider and pass upon an independent adverse claim of title, unconnected with that under which the mortgagee claimed, and alleged to be a cloud upon the mortgagee's title. In that case the owner of the tax title which constituted the alleged cloud, appeared, and answered, setting up his title as adverse to and independent of the supposed title of the mortgagor or of the mortgagee. That decision should be limited to the facts so disclosed. In this case no such defence was set up, and the allegations of the bill were admitted by the default to be true.

4. PRACTICE—*in chancery—time to object for multifariousness, or that there is a remedy at law.* Where a bill in chancery for the foreclosure of a mortgage, also seeks to have removed an alleged cloud upon the title under which the mortgagee claims, the bill disclosing upon its face that the alleged cloud consists of an adverse claim of title independent of and unconnected with that of either the mortgagor or the mortgagee, an objection that the bill is multifarious because of the two-fold character of relief sought, or because the complainant has an adequate remedy at law in respect of the adverse claim of title, can not be availed of in the first instance in a court of review.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on writ of error to the Circuit Court of Cook county; the Hon. E. S. WILLIAMS, Judge, presiding.

The board of directors of the Chicago Theological Seminary exhibited their bill in chancery in the circuit court of Cook county, against Joshua A. Severns, Thomas D. Snyder,

Asahel Gage, and others. The purpose of the bill was to foreclose a deed of trust executed by Severns to Snyder to secure a promissory note given by Severns to complainants, and also to remove an alleged cloud upon the title of a part of the mortgaged lands. In respect to a portion of the claims constituting the alleged cloud upon title, the bill averred that defendant Gage claimed to have interests in said premises by reason of certain pretended sales thereof for the State and county taxes pretended to have been assessed and levied thereon, and also for pretended sales for the city taxes of the city of Chicago, pretended to have been assessed and levied thereon, and by deeds issued by the county clerk of Cook county thereunder. But, the bill further alleged, whatever interest in said premises the defendant Gage had, if any, was subsequent and subordinate to the rights of complainant. It was alleged the tax levy, the judgment, and all proceedings thereunder, were void. The prayer of the bill was, besides the foreclosure, that the tax sales be declared void, and that all tax certificates or deeds held by Gage, affecting the mortgaged premises, be adjudged void, and be delivered up to be canceled.

Subsequently, upon leave granted, an amended bill was filed, in which it was alleged that Gage claimed interest in certain of the lots included in the deed of trust, through a tax deed issued to him April 18, 1874, by the county clerk, upon certain sales for taxes due for the year 1870; that said sales and deed were void, and that by reason of such pretended sales and deed a cloud existed upon the title of complainants, and the security of their said trust deed was thereby impaired.

Gage failing to answer the original or amended bill in any way, his default was entered, as follows: "And on filing due proof of personal service issued in said cause on said defendant, Asahel Gage, ten days, at least, before the return day thereof, * * * it is ordered that said defendant, Asahel

Gage, * * * plead, answer or demur to the amended bill of complaint in said cause, instanter; and said defendant, though solemnly called in open court, came not, but made default: whereupon it is ordered that the complainant's bill and amended bill of complaint in said cause be and they are hereby taken as confessed by said defendant Asahel Gage."

Afterwards the final decree was entered, reciting that it appearing from the writs issued to the sheriff of Cook county and the return thereon, that defendant, Asahel Gage, had been served with process at least ten days prior to the first day of the then present term of court, and having been ordered to plead, answer or demur to the amended bill of said complainants instanter, and not having done so, the default of said Asahel Gage was theretofore entered. It was therefore decreed that the bill be taken as confessed against said defendant.

It was then found by the decree that the allegations in the bill contained were true as therein stated, and that the equities were with the complainants. After providing for the matter of foreclosure, the decree declared: "It is further ordered, adjudged and decreed that said tax deed, issued April 18, 1874, by the county clerk, upon lots 17, 18, 19, 20, 21 and 22, in block 13, to Asahel Gage, upon certain pretended sales for State and county taxes of the year 1870, is null and void, and is hereby removed and set aside as a cloud upon the title of these complainants."

This decree, in so far as it concerned Gage, was reversed by the Appellate Court, and the case is brought to this court on error.

Mr. AUGUSTUS N. GAGE, for the defendant in error, in support of the motion to dismiss the writ of error, made the following points:

There can be no jurisdiction in this court to consider this writ of error, unless, first, there is a freehold involved; sec-

ond, the amount in controversy exceeds $1000; or, third, the Appellate Court has certified questions of law. The nature of the suit is such, this must be so. Sec. 8, Appellate Court act, Laws of 1877, p. 70.

This is a bill to foreclose a mortgage. In such proceedings a freehold is not involved. *Grand Tower Mining Mfg. Co.* v. *Hall*, 94 Ill. 152; *Carbine* v. *Fox*, 98 id. 146; *Pinneo* v. *Knox*, 100 id. 471; *McIntyre* v. *Yates*, id. 475; *Gage* v. *Board of Directors*, 8 Bradw. 410.

This record does not show the value of these lots, and there is nothing to show the value in controversy. "The value in controversy not appearing to be $1000," the writ of error should be dismissed. *Talcott* v. *Schuh*, 95 Ill. 201.

Mr. DAVID FALES, for the plaintiff in error, *contra:*

As to strangers and third parties, the mortgagee is the owner of the fee. He has the *jus in re* as well as the *jus ad rem*, and is entitled to all the rights and remedies which the law gives the owner. *Oldham* v. *Pfleger*, 84 Ill. 102; *Carroll* v. *Ballance*, 26 id. 17; *Delehay* v. *Clement*, 3 Scam. 202; *Vanzant* v. *Allmon*, 23 id. 33.

The default was taken upon a bill to foreclose, which charged "that all interest of the defendant was acquired subsequently to the interest of your orator, and is subject to the rights of the complainant," and the default. *French* v. *Martin*, 19 Ill. 111; *Thompson* v. *Morris*, 57 id. 339; *Boston* v. *Nichols*, 47 id. 353; *Hewing* v. *Woodhull*, 29 id. 92.

This court will look into the record to see if the amount involved is sufficient to give jurisdiction. *Morris* v. *Preston*, 93 Ill. 215.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

This was a proceeding in equity, in the circuit court of Cook county, instituted by the plaintiff in error, against the defendant in error and others, for the purpose of foreclosing

a deed of trust executed by Joshua Severns to Thomas D. Snyder, to secure a note given by Severns to plaintiff in error for $15,000, and also for the purpose of removing an alleged cloud upon the title of a part of the mortgaged premises. Gage, though duly served with process, made no defence, and a decree *pro confesso* was rendered against him, setting aside certain tax deeds of his as a cloud upon the title of complainant. There was also a decree of foreclosure as to the other defendants, as prayed for in the bill. This decree as to Gage was reversed on error by the Appellate Court for the First District, the other parties acquiescing in the decree of the circuit court. Upon removing the record to this court for review, the defendant in error entered a formal motion to dismiss the writ of error, on the ground there is no law authorizing the writ in a case like this, which was reserved for the final consideration of the cause.

For the purposes of this motion, and indeed for all other purposes, the record before us, so far as it relates to the foreclosure of the deed of trust and to the parties to the original proceeding who have ceased to have any connection with it, must be kept out of view, and the case must be regarded precisely as if plaintiff in error had in the first instance filed a bill against Gage alone, for the purpose of having his tax deeds set aside as a cloud upon complainant's title, and Gage had suffered a decree by default to go against him in the manner he did.

The rule seems to be established by this court that a freehold will be regarded as involved in all cases where real estate is claimed under a deed regular on its face, and purporting to pass the title, which is sought to be set aside by an adverse claimant as a cloud upon the latter's title. *Hutchinson* v. *Howe*, 100 Ill. 20; *Gage* v. *Scales*, id. 218. While the writer of this opinion has never believed, and does not now believe, the rule in question is warranted by a fair construction of the statute, yet as a majority of the court hold the contrary view,

as shown in the cases cited, he submits to it purely on the ground of judicial precedent.

Applying, then, the rule to the case before us, it follows that a freehold is involved, and the motion to dismiss the writ of error must be overruled.

The 88th section of the Practice act of 1877 provided that appeals from and writs of error to the circuit courts, etc., in all criminal cases and cases in which a franchise, or freehold, or the validity of a statute was involved, *except in chancery* cases, should be taken directly to the Supreme Court, provided the party appealing or prosecuting the writ of error should elect to do so. Under that act it was held that chancery causes, although involving a freehold, franchise, or the validity of a statute, could only be brought to this court through the Appellate Court. The 88th section, however, was amended, in 1879, by dropping out the exception relating to chancery cases, thus putting all cases, whether at law or in equity, upon the same footing in this respect.

Since the amendatory act of 1879, all cases involving a franchise, freehold, etc., without regard to whether they are chancery or law cases, are required to come directly to this court. It therefore follows, the writ of error from the Appellate to the circuit court was improperly sued out in this case, and that that court failed to acquire jurisdiction to review the decree of the circuit court.

The judgment of the Appellate Court must therefore be reversed, and the cause remanded, with direction to that court to dismiss the writ of error.

Under the circumstances of this case we deem it proper to state there seems to be a misapprehension of the true scope and effect of the decision in the case of *Gage* v. *Perry*, 93 Ill. 176. What is there said as to the right of a court of equity, upon a bill to foreclose a mortgage, to consider and pass upon an independent title, unconnected with that under which the mortgagee claims, and which is alleged to be a cloud upon

the mortgagee's title, must be limited to the facts of that case. There the owner of the tax title appeared, and by his answer insisted that he did not claim title under the mortgagor, and that his rights were not subject to that of the mortgagee, and this answer was sustained by the proofs. In the present case no such defence is set up, by answer or otherwise, and the allegations of the bill are admitted by the default to be true.

But suppose the bill showed upon its face that the tax deeds in this case were an independent outstanding title, and that as to them the complainant had a complete remedy at law, it does not follow the decree should be reversed. It would simply show that there were two good defences to the bill, if insisted on at the proper time and in the legal mode, namely, multifariousness, and that the complainant had a complete remedy at law, yet nothing is better settled than that neither of these defences can be availed of in the first instance, as is sought to be done here, in a court of review. 1 Daniell's Ch. Prac. 346, note 3; *Labadie* v. *Hewitt*, 85 Ill. 341; *Henderson* v. *Cummings*, 44 id. 325; *Gilmore* v. *Sapp*, 101 id. 297; *Stout* v. *Cook*, 41 Ill. 447; *Hickey* v. *Forristal*, 49 id. 255; *Magee* v. *Magee*, 51 id. 500; *Dodge* v. *Wright*, 48 id. 382; *Knox County* v. *Davis*, 63 id. 405.

It was not intended by what was said in *Gage* v. *Perry*, to at all qualify or infringe upon the well recognized principles of equity law.

Judgment reversed.

Syllabus. Brief for the Appellant.

SAMUEL WEHRLY

v.

DANIEL MORFOOT.

Filed at Springfield March 28, 1882—Rehearing denied June Term, 1882.

1. FORMER RECOVERY—*of entire and separate demands—as, principal and interest.* Where a promissory note, running, according to the face of it, for several years, provides that the interest shall be payable annually, and "if the interest is not so paid the entire principal sum shall immediately become due and payable," the omission to pay the interest for a given year will not operate to render the annual interest thus accrued and unpaid, together with the principal sum, an entire demand, in any such sense as will preclude a recovery for each year's interest as it shall accrue, in successive suits therefor.

2. So where a recovery was had for one year's interest, under such a contract, it was held the judgment so recovered would not operate as a bar to a subsequent suit for the interest which had accrued in the succeeding year.

3. Of course, if the prior action had been brought for the principal sum, and the interest which had accrued up to a particular date, then the recovery therein would bar any further suit upon the note, although it was for less than the amount actually due.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Greene County; the Hon. ALBERT G. BURR, Judge, presiding.

Mr. J. R. WARD, for the appellant:

In this State, on a note like this, the holder can recover the entire principal and interest due thereon in one action, on the first default in the payment of interest, before such note is due and payable in case of no default. *Terry et al.* v. *Trustees*, 70 Ill. 237; *Ottawa Northern Plank Road Co.* v. *Murray*, 15 id. 337; *Carlon* v. *Kenealy*, 12 Mees. & Wels. 139; *Blakely* v. *Lawrence*, 4 Esp. 147; *Siddall* v. *Rawcliff*, 1 Mood. & Rob. 263; *Hemp* v. *Garland*, (4 Q. B.) 4 Adol. & Ellis, N. S. 519; *Beckwith* v. *Nott*, 2 Cro. Jac. 504; Chitty on Bills, 678; 2 Parsons on Notes and Bills, 252, 394; *Streeter* v. *Streeter*, 43 Ill. 165.

A plaintiff can not so divide an entire demand or cause of action as to maintain several actions for its recovery. And if he sues and recovers a judgment for a part only of such claim, the remaining portion is barred by that recovery. *Camp* v. *Morgan*, 21 Ill. 158; *Casselberry* v. *Forquer*, 27 id. 171; *Matthias et al.* v. *Cook*, 31 id. 87; *Drake* v. *Perry*, 58 id. 123; *Rosenmueller* v. *Lampe*, 89 id. 215; *Nickerson* v. *Rockwell*, 90 id. 463; *Wagner* v. *Jacoby*, 26 Mo. 532; *Pinney* v. *Barnes*, 17 Conn. 428; *Avery* v. *Fitch*, 4 id. 364; *Hopf* v. *Myers*, 42 Barb. 272; *Miller* v. *Covert*, 1 Wend. 489; *Firemen's Ins. Co.* v. *Cochran*, 27 Ala. 237; *O'Neal* v. *Brown*, 21 id. 485; *Dalton* v. *Bently*, 15 Ill. 421; *Gaddis* v. *Leesem*, 55 id. 555.

The principal of these notes was payable, absolutely, ten years after date, or before that period whenever a default in the payment of the interest annually was made. *McCarty* v. *Howell*, 24 Ill. 345; *Ernest* v. *Steckman*, 74 Pa. St. 13; *Jordon* v. *Tate*, 19 Ohio, 586; *Walker* v. *Woolen*, 54 Ind. 165; *Mattison* v. *Marks*, 31 Mich. 421.

Mr. HENRY C. WITHERS, for the appellee:

To constitute a judgment in a former suit an estoppel or bar, it must appear that the same subject matter had been passed upon and adjudicated in that suit. *Clemens* v. *Murphy*, 40 Mo. 121; *Ridgley* v. *Stillwell*, 27 id. 128; *Haight* v. *City of Keokuk*, 4 Iowa, 207; *Griffin* v. *Seymour*, 15 id. 32; *Duncan* v. *Holcomb*, 26 Ind. 379.

When the contract contains two distinct promises to be performed at different times, as, the payment of principal at a given time, and interest annually, a recovery of a year's interest, even after the maturity of the note as to the principal, is no bar to a suit for the principal. *Badger* v. *Titcomb*, 15 Pick. 413; *Cooke* v. *Wherwood*, 2 Saund. 337; *Perkins* v. *Hart*, 11 Wheat. 251; *Lord* v. *Belknap*, 1 Cush. 279; *Greenleaf* v. *Kellogg*, 2 Mass. 568; *Cooley* v. *Rose*, 3 Ind. 221;

Walker v. *Kimball*, 22 Ill. 538; *Perry* v. *Harrington*, 2 Metc. 368; *Rodemer* v. *Hazlehurst*, 9 Gill, 289; *Sterner* v. *Gower*, 3 W. & S. 136; *Sickles* v. *Patterson*, 14 Wend. 257; *Andover Savings Bank* v. *Adams*, 1 Allen, 28; *Sparhawk* v. *Wills*, 6 Gray, 163.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action of assumpsit, brought to recover one year's interest, alleged to be due on February 3, 1881, on four promissory notes, three of them for $2000 each, and the other for $1600, on the latter of which there was paid on the principal $1150, February 2, 1879. Each one of the notes bore date February 3, 1877, and was payable ten years after date, with ten per cent interest per annum, payable annually, with this provision: "If the interest is not so paid, the entire principal sum shall immediately become due and payable." The interest on each note had been paid to February 3, 1879. The defendant pleaded in bar the bringing of a former suit for the one year's interest which fell due on February 3, 1880, and the recovery therein of the sum of $659.35. A demurrer to the plea was sustained, and the defendant abiding by his plea, judgment was rendered against him for the amount of the year's interest due February 3, 1881, which judgment, on appeal to the Appellate Court for the Third District, was affirmed, and defendant appealed to this court.

There is somewhat of ambiguity in the allegations of the plea as to whether they show that the former action was brought for the recovery of the interest, only, due on February 3, 1880, or for the whole principal of the notes and the interest due at that time. Of course, if for the latter, the recovery would be a bar to any further suit upon the notes, although it was for less than the amount due. But construing the averments of the plea most strongly against the pleader, as is proper, we think the fair showing of the plea

is, that the former suit was brought for the recovery of the interest, only, due February 3, 1880, and we so treat the plea.

The contention of appellant is, that upon the default in payment of the interest due upon each of the notes on February 3, 1880, the entire principal sum of each note became due and payable by the explicit terms of the note, and that the amount of the principal and the interest due upon each note thereupon became one entire demand and cause of action upon the note; that a plaintiff can not so divide an entire demand or cause of action as to maintain several actions for its recovery, and if he sues and recovers a judgment for a part, only, of such claim, the remaining portion is barred by that recovery. We do not see but what this case is precisely covered by the decision of this court at the last term in *Dulaney* v. *Payne*, 101 Ill. 325, which held that where a note is given, payable in one year, with interest payable semi-annually, a suit brought two years thereafter for and a recovery of the interest, is no bar to a subsequent action on the note to recover the principal. While there acknowledging the doctrine that a recovery for a part of an entire demand will bar an action for the remainder, we followed the authority of *Sparhawk* v. *Wills*, 6 Gray, 163, and *Andover Savings Bank* v. *Adams*, 1 Allen, 28, to the effect that judgment for installments of interest on a note would not bar a subsequent action for the principal, although it was due when the former action was commenced, they holding that a promise to pay a debt at one time and the interest at another, was to be construed as containing distinct promises giving several causes of action, and they being several in their origin, no subsequent act could make them one and entire.

Upon the authority of *Dulaney* v. *Payne*, the plea was bad, and the demurrer to it was properly sustained.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

Syllabus.

THE PEORIA AND SPRINGFIELD RAILROAD COMPANY

v.

S. H. THOMPSON.

Filed at Springfield March 28, 1882—Rehearing denied June Term, 1882.

1. RAILROADS—*constitutional prohibition against issue of bonds or stock, except for money, labor or property received.* The object of sec. 13, art. 11, of the present constitution, in providing that "no railroad corporation shall issue any stock or bonds, except for money, labor or property actually received and applied to the purposes for which such corporation was created," and that "all stocks, dividends, and other fictitious increase of the capital stock or indebtedness of such corporation shall be void," was to prevent reckless and unscrupulous speculators, under the guise or pretense of building a railroad or of accomplishing some other legitimate corporate purpose, from fraudulently issuing and putting upon the market bonds or stocks that do not, and are not intended to, represent money or property of any kind, either in possession or in expectancy, the stock or bonds in such case being entirely fictitious.

2. SAME—*and herein, of the rights of innocent holders of railroad bonds.* But it was not intended by that provision to interfere with the usual and customary methods of raising funds by railroad companies, by the issue of its stocks or bonds, for the purpose of building their roads, or of accomplishing other legitimate corporate purposes. Under that provision of the constitution, railroad companies have no right to lend, give away, or sell on credit, their bonds or stock, nor have they the right to dispose of either, except for a present consideration, and for a corporate purpose. But if, upon a sale of its stocks or bonds by a railroad company for a present consideration, it should subsequently divert the proceeds to other than corporate purposes, the purchaser of such stock or bonds, who has acted in good faith in the matter, or his assignee, can not be affected by the subsequent misappropriation by the company.

3. In short, where one, for a present consideration, in good faith purchases bonds or stocks in the regular course of business from a railroad company, and such consideration is accepted by the proper officer of the company, and nothing appears to show that it is to be used or applied to other than legitimate corporate purposes, such bonds or stocks, when thus issued, will be regarded as having been issued for money, labor or property "actually received and applied," within the meaning of the constitutional provision.

4. EQUITABLE DEFENCES—*as against a holder of negotiable paper secured by mortgage—former decisions.* It was held in *Olds* v. *Cummings*, 31 Ill. 188, that the holder of commercial paper, seeking to enforce in equity

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36a 444
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47a 609
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166 499
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67a 77
103 187
169 274
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78a 551
103 187
82a 450
103 187
184 39
103 187
90a 8485
103 187
192 9168
103 187
195 4297
103 187
115a 1495
115a 8497

a mortgage security therefor, was subject to any defence which would have been good against the mortgage in the hands of the mortgagee himself, although such holder may have purchased the paper in good faith, and before its maturity.

5. But this doctrine has no application to deeds of trust given to secure railroad coupon bonds intended to be thrown upon the market and circulated as commercial paper, and to be used as securities for permanent investments.

6. So where such railroad bonds, secured by deed of trust for the benefit of the holders thereof, had been issued, and delivered to contractors engaged in the construction of the road, and by them disposed of in the market to innocent purchasers, on bill by the trustee to foreclose the deed of trust for the benefit of the bondholders, it was *held*, the unsettled equities and matters of account between the company and the contractors could not be interposed in defence against the bill.

7. A part of the reasoning of the court in *Chicago, Danville and Vincennes Ry. Co.* v. *Loewenthal*, 93 Ill. 433, is not to be reconciled with the rule here announced. But what appears in the opinion relating to the question here mentioned was said *in arguendo*, and after the case had been decided upon another distinct ground, and without any argument of the question except upon one side. Under these circumstances, it is considered that what was there said ought not to be, and is not, regarded as conclusive of the question, and the court is satisfied the view now presented is the correct one.

8. CORPORATIONS—*acts ultra vires—estoppel.* While it is the general principle that negotiable securities issued by a corporation without authority of law, or in express violation of a statute, are inoperative and void even in the hands of innocent holders, yet there is another rule of law equally well settled—that although a contract entered into by the agents or officers of a private corporation is *ultra vires*, and therefore not binding on the company so long as it remains executory, yet if the company in such case knowingly permits the other contracting party, without objection, to go on and perform the contract on his part, and thereby obtains and appropriates to its own use money, property or labor in furtherance of some legitimate corporate purpose, it will be estopped from denying its liability on such contract.

9. REDEMPTION—*of railroad property sold on foreclosure.* Where a railroad, its appurtenances and franchises, are mortgaged as a whole, there is no power or authority to sell them separately, and such property, taken as a whole, not being, strictly speaking, either real or personal estate, when sold on a decree of foreclosure is properly sold without any right of redemption. The rule is founded partly upon considerations of public policy.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. D. MCCULLOCH, Judge, presiding.

Statement of the case.

The Peoria and Springfield Railroad Company, a corporation duly organized under the laws of this State, on the 31st day of October, 1871, entered into a written contract with B. S. Prettyman, D. T. Thompson, Thos. Edes, A. J. Ware, B. E. Smith, C. R. Griggs and W. Dennison, by which the latter covenanted and agreed to furnish the materials, build and complete in a good, workmanlike manner, a single track railway, with necessary sidings and passing places, from the city of Peoria, in Peoria county, via the city of Pekin, in Tazewell county, to the city of Springfield, in Sangamon county, this State, in consideration of which, among other things, the railroad company agreed to pay the above named contractors the sum of $20,000 per mile in first mortgage seven per cent bonds of the company, which were to be made the first "and exclusive lien on said railroad, its franchises, property and equipments of every kind." Said bonds, or so many of them as might be required, were to be delivered by the company to the contractors, or their agents, at any time, on demand, to be used by them "to pay for iron, materials or labor for the construction of said road, or to be sold for money," upon satisfactory evidence being produced that the materials were purchased for the use of the road, or the work and labor were done according to the terms of the contract. The company also agreed to pay the contractors in the paid up capital stock of the company the additional sum of $12,000 per mile for said railway, to be issued whenever required for the construction of the road.

Subsequent to this contract, and before the 13th of February, 1872, by some arrangement between the contracting parties, Edes and Prettyman withdrew from the undertaking, and Smith, Griggs, Dennison, Ware and Thompson, the remaining contractors, assumed the performance of the contract with the railroad company. Upon this change in the parties to the enterprise, it was agreed that the business should thereafter be conducted under the name and style of

Thompson, Griggs & Co.; that Ware and Thompson should receive nothing for their services, and that Smith, Griggs and Dennison should furnish the money, and that Smith alone should have exclusive charge of the financial matters of the company. This arrangement seems to have been acquiesced in by appellant, for on the day last mentioned a supplementary agreement was entered into between the railroad company and the members of the firm of Thompson, Griggs & Co., in which the making of the former agreement is recited, and by the terms of which the contractors bound themselves to furnish the necessary material and build a bridge, of a specified character, on the line of the company's road across the Illinois river, for which the company agreed to pay them in said first mortgage bonds, at par value, the additional sum of $200,000.

In pursuance of these contracts, on the 11th of April following, the railroad company, through its board of directors, adopted certain resolutions, wherein it ordered and directed "that a series of one thousand five hundred of the company's bonds, each for the sum of $1000, to be numbered consecutively from one to fifteen hundred, inclusive, be prepared for issue and delivery, signed by the president and secretary, the corporate seal of the company to be affixed thereto, and authenticated, when so signed and sealed, by the certificate of a trustee, bearing date the first day of April, 1872, and payable to I. E. Leonard, or bearer, in the city of New York, at such place therein as such company shall from time to time appoint, on the first day of April, * * * 1902, with interest warrants thereto attached, signed by the secretary, for the payment of interest thereon, at the rate of seven per cent per annum, free from government tax, payable at the same place on the successive days of October and April of each year, both the principal and interest of such bonds to be payable in gold." It was further ordered and directed in and by said resolutions, that a deed of trust be prepared

and executed by the president and secretary of the company conveying the road of the company, its appurtenances, appendages, franchises, equipments, tolls, income, assets and property, then possessed or thereafter acquired, to William A. Dennison, trustee, to secure the payment of said bonds and interest warrants.

The bonds and trust deed were prepared and duly executed in conformity with the directions of the company as expressed in the above resolutions, as of the date of April the 1st, 1872. The bonds, when so executed by the company, were sent to Smith, at Columbus, Ohio, for the purpose of having them certified by Dennison, as in the trust deed provided. Six hundred of these bonds were, on presentation, accordingly certified by Dennison, and left by him with Smith in the latter's office, in Columbus, Ohio, where Dennison and Smith both resided, and where the latter kept his office. The remaining nine hundred bonds were never so certified or used for any purpose.

About the time of the preparation of these bonds and the trust deed, or perhaps a short time before, Thompson, Griggs & Co. commenced active operations in the building and construction of the road and bridge, under the contracts above mentioned, and so continued until in January, 1873, when the work was suspended, and has never since been resumed. Before the abandonment of the work the contractors had already completed the bridge, and substantially finished as much of the road as lies between Peoria and Pekin, a distance of twelve miles. On the 8th of April following the suspension of the work in January, the railroad company leased the completed portion of its road lying between Pekin and Peoria to the Indianapolis, Bloomington and Western Railway Company, for ninety-nine years from the 1st day of February, 1873, with a covenant of renewal forever, at an annual rental of $50,000, a part of which was to be applied by the lessee to the payment of the semi-annual interest on

six hundred of the above mentioned bonds, and the balance of the rental to be paid to the railroad company. Upon the execution of this lease a certificate was endorsed upon the six hundred bonds above mentioned, showing the payment of the interest was assumed by the Indianapolis, Bloomington and Western Railway Company. Five hundred and ninety of these bonds being thus executed by the company, certified by the trustee, and the interest assumed by the lessee of the road, in the manner stated, were from time to time negotiated and transferred, in the regular course of business, by Thompson, Griggs & Co., and have passed into the hands of the present holders for value, without notice of any supposed infirmity in them, being the same bonds now in controversy. The remaining ten of the six hundred, after having been used for some time as collateral security, have since been brought into court and surrendered up, and are therefore eliminated from the present controversy.

The trust deed above mentioned expressly provided that in case the company should, for the term of six months, make default in the payment of the interest on its bonds, the principal should also become due and payable at the option of the holders of the bonds. Default having been made in the payment of the interest on a part of these bonds, Samuel H. Thompson, on the 22d of May, 1875, filed in the Peoria county circuit court the original bill in this case, against the railroad company, Dennison, the trustee, and various other parties in interest, alleging that he was owner of five of the bonds in question; that default had been made in payment of the interest thereon for more than six months; that the company had become insolvent; that its property was depreciating, and that it had ceased to apply the earnings of the road to the payment of the interest on its bonded indebtedness, whereby the complainant and other bondholders were in danger of losing their claims, etc., and prayed a foreclosure of the deed of trust, and that a receiver might be

appointed to take immediate charge of the road and assets of the company. Upon the filing of this bill, the court, on the same day, appointed James Haines receiver, who thereupon qualified, and entered upon the duties of his appointment.

Dennison, the trustee, on the 2d of January, 1877, filed an answer and also a cross-bill, setting up the making of the bonds and trust deed, as heretofore stated; the leasing of the road to the Indianapolis, Bloomington and Western Railway Company; the insolvency of the latter company; the default in payment of interest on all the bonds; the insolvency of the Peoria and Springfield Railroad Company, and the sale and transfer by it of the six hundred bonds in question about the time of their date, and prayed for a foreclosure of the trust deed.

The company, by its answers to the original bill and cross-bill of Dennison, admits the making of the trust deed and bonds by the company, but denies they were ever negotiated or delivered by it. It at the same time filed a cross-bill, in which the same facts are reiterated. It is also charged in the cross-bill that Thompson, Griggs & Co. entered into a conspiracy to wrongfully and fraudulently appropriate the bonds in controversy to themselves; that they have failed to perform their contract with the company for the building of the road, and procuring the right of way, by reason of which, it is claimed, the company has sustained large damages, which it asks to be recouped or set off against the claims sought to be enforced against the road.

Numerous other pleadings were filed and orders entered in the cause, whereby the issues were finally made up, which are not necessary to be particularly noticed in order to a proper understanding of the case.

Dennison having resigned as trustee pending the suit, William F. Bryan was appointed trustee in his stead, who filed a supplemental cross-bill on behalf of the bondholders. The circuit court found the equities with the bondholders as

against the company, ascertained the amount of its indebtedness, and ordered the same paid within a specified time, and in default of such payment ordered a sale of the mortgaged property, and directed the proceeds, after the payment of the expenses of the trust, including costs and certain preferred claims against the company specified in the decree, to be applied to the payment of its bonded indebtedness, and the residue, if any, after the payment of all claims, to be paid over to the company. From this decree the company appealed to the Appellate Court for the Second District, where the same was affirmed, and the cause is brought here by further appeal from the Appellate Court.

Such facts not appearing in the foregoing statement as are necessary to an understanding of the controverted questions in the case, sufficiently appear in the opinion of the court.

Messrs. PRETTYMAN & HUGHES, for the appellant:

The bonds in question are void, the company, under the constitution and law, having no power to issue them except for "money, labor or property actually received and applied to the purpose for which the corporation was created." Const. 1870, art. 11, sec. 13; Rev. Stat. 1874, chap. 114, sec. 22.

When the legislature prohibits an act, or declares it shall be unlawful to do it, the courts must hold such act void. *Mutual Ins. Co.* v. *Rosenthal*, 55 Ill. 91; *Munsell* v. *Trumble*, 3 Gilm. 93; *People* v. *Chicago*, 51 Ill. 34; *Bank* v. *Owens*, 2 Pet. 527; *Bester et al.* v. *Wathen et al.* 60 Ill. 138; *Linder* v. *Carpenter*, 62 id. 309; *St. Louis, Jacksonville and Chicago R. R. Co.* v. *Mather*, 71 id. 592; *Wheeler* v. *Russell*, 17 Mass. 281; *Insurance Co.* v. *Kipp*, 8 Cow. 20; *White* v. *F. Bank*, 22 Pick. 184; *Bailey* v. *Tabor*, 5 Mass. 292; *Mitchell* v. *Smith*, 1 Binn. 110.

When the constitution forbids issuing such bonds without such payment, they can have, when so issued, no more validity than the bonds of a county issued without an election. *Law*

v. *People*, 87 Ill. 385; *Fuller* v. *Chicago*, 89 id. 282; *County of Hardin* v. *McFarlin*, 82 id. 138; *Jackson County* v. *Bush*, 77 id. 66; *Town of Elmwood* v. *Marcy*, 2 Otto, 289; *Aspinwall County* v. *Davis*, 22 How. 365; *Concord* v. *State Bank*, 92 U. S. 625; *Greencastle* v. *Black*, 5 Ind. 569; *Lockport* v. *Gaylord*, 61 Ill. 276; *Hills* v. *Chicago*, 60 id. 91; *Chance* v. *Marion County*, 64 id. 66; *Buchanan* v. *Litchfield*, 12 Otto, 292; *Town of Pana* v. *Lloyd*, 97 Ill. 191; *Force* v. *Town of Batavia*, 61 id. 100; *Williams* v. *Roberts*, 88 id. 13; *Lippincott* v. *Pana*, 92 id. 34; *Marshall County* v. *Cook*, 38 id. 48; *Lewis* v. *Shreveport*, 3 Wood, 213.

A *bona fide* holder is not protected when the maker has no power to make or issue such paper. Such bonds have not the quality of commercial paper. The law is notice of the want of power to issue. *Marsh* v. *Fulton County*, 10 Wall. 676; *Loan Association* v. *Topeka*, 20 id. 655; *Town of Elmwood* v. *Marcy*, 92 U. S. 289; *Town of Oakland* v. *Skinner*, 94 id. 258; *Town of Ottawa* v. *Perkins*, 94 id. 260; *McClure* v. *Oxford*, 94 id. 429; *Antony* v. *Jasper County*, 101 id. 101; *Wadsworth* v. *Eu Clare County*, 102 id. 536; *Aspinwall* v. *Comrs. D. Co.* 22 How. 364; *Lewis* v. *Barber County*, 3 Fed. Rep. 191; *Chisholm* v. *County of Montgomery*, 2 Wood, 595; *M. S. I. and T. Co.* v. *Goodrich*, 75 Ill. 559; *Gadis* v. *Richland County*, 92 id. 120; *Marsh* v. *Fairbury, Pontiac and Northwestern R. R. Co.* 64 id. 414; *Bates County* v. *Winters*, 97 U. S. 91; *Railway Co.* v. *Allison*, 18 Wall. 233; *Willis* v. *Supervisors*, 12 Otto, 625.

The original payee of bonds secured by mortgage or deed of trust holds the same subject to all defences in equity, and his assignee, or the subsequent holder, takes, in equity, subject to the same defences. *Olds* v. *Cummings*, 31 Ill. 188; *Haskell* v. *Brown*, 65 id. 29; *Thompson* v. *Shoemaker*, 68 id. 256; *Bryant* v. *Vix*, 83 id. 14; *Sargent* v. *Howe*, 21 id. 148; *Kleeman* v. *Frisby*, 63 id. 482; *Chicago, Danville and Vincennes R. R. Co.* v. *Loewenthal*, 93 id. 433; *Pettilon* v. *Noble*,

73 id. 567; *Foster* v. *King*, 5 Bradw. 223; *Belohradsky* v. *Kuhn*, 69 Ill. 547.

The court erred in ordering a sale of the entire road, with tools, accounts, claims and personal assets, without redemption. The right to redeem real estate sold on decree of foreclosure is a statutory right, and can not be taken away by decree. *Palmer* v. *Forbes*, 23 Ill. 301; *Tytus* v. *Mabee*, 25 id. 257; *Fisher* v. *Palmer*, 50 id. 226; *Wolf* v. *Hogan*, 24 id. 525; *Warner* v. *D. C. N. Bank*, 4 Bradw. 305; *Karnes* v. *Lloyd*, 52 Ill. 116.

Mr. H. B. HOPKINS, and Mr. JOHN B. COHRS, for the appellee:

The bonds in question are no infraction of sec. 13, art. 11, of the constitution, as they represent no fictitious indebtedness. The entire road was built from the proceeds of these bonds. But the company, by securing and applying to its use the proceeds of the bonds, is estopped from making the objection that they were issued in violation of the constitution. *Aurora Agricultural and Horticultural Society* v. *Paddock*, 80 Ill. 266; *Whiting Arms Co.* v. *Barlow*, 63 N. Y. 62; *Zabrieski* v. *C. C. and C. R. R. Co.* 23 How. 381; 2 Kent's Com. (11th ed.) 381, note; *Darst* v. *Gale*, 83 Ill. 136; *Bradley* v. *Ballard*, 55 id. 413; *West et al.* v. *Madison County Agricultural Board*, 82 id. 205; *Chicago Building Society* v. *Crowell*, 65 id. 453; *McCarthy* v. *Lavasche*, 89 id. 270; *Bissell* v. *M. S. and N. I. R. R. Co.* 22 N. Y. 258; *Argenti* v. *San Francisco*, 16 Cal. 255; *McClure* v. *Manchester and L. R. R. Co.* 13 Gray, 124.

We maintain that the bonds are not affected by equities, if any exist, between the Peoria and Springfield Railroad Company and the firm of Thompson, Griggs & Co. The rule on this point adopted in this State is opposed to the settled doctrine of the other courts of the country generally, including both State and Federal courts. 1 Daniell on Negotiable Inst. secs. 834–836; 2 Jones on Mortgages, secs. 1485–1487, sec.

834, note 1; *Carpenter* v. *Logan*, 16 Wall. 271; *Endicott* v. *Supervisors*, 16 id. 458; *Taylor* v. *Perry*, 6 Allen, 86; *Pierce* v. *Force*, 47 Me. 507; *Reeves* v. *Smiley*, Walker's Ch. 248; *Bloomer* v. *Henderson*, 8 Mich. 395; *Fisher* v. *Otis*, 3 Chand. 83; *Martin* v. *McCullom*, 4 id. 153; *Croft* v. *Brewster*, 9 Wis. 503; *Cornell* v. *Hutchins*, 11 id. 353.

The bonds being made payable to the holder, and transferable by delivery, the company has contracted itself out of its right to set up equities. *Higgs* v. *A. T. Co.* (Law R.) 4 Exch. 387; *In re Blakesly*, id. 3 Ch. 154; Green's Brice on Ultra Vires, 163–167; *McElrath* v. *P. and S. R. R. Co.* 55 Pa. St. 206; *Sappington* v. *Pulliam*, 3 Scam. 385; *Cranch* v. *Credit Foncier*, 6 Eng. 117; *Rumbel* v. *Metropolitan Bank*, 20 id. 276; *Moore* v. *Met.* 55 N. Y. 41; *Johnson* v. *Stark County*, 24 Ill. 75; *City of Pekin* v. *Reynolds*, 31 id. 529; *Jones* v. *Nellis*, 41 id. 482; *Garvin* v. *Wiswell*, 83 id. 218; *Smith* v. *Johnson*, Breese, 18; *Town of Eagle* v. *Cohn*, 84 Ill. 218.

There was no error in the decree touching redemption of the mortgaged property. There is no statute authorizing redemption of the class of property in question. The mortgaged property, in its integrity as a unit, is made up of three inseparable constituent parts: First, intangible personal property, such as franchises, charter rights, right to levy tolls, etc.; second, tangible personal property, embracing rolling stock and all other movable property, incomes, profits, tolls, contracts, good will, etc.; third, qualified interest in lands, being an easement or right of way.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

Some of the questions presented by this record are of unusual interest, and have been discussed by counsel on both sides with marked ability; and after a careful consideration of all that has been urged both *pro* and *con*, and a laborious and patient examination of the vast amount of testimony which has been taken in the cause, with a view of

obtaining an accurate knowledge of the material facts upon which the controversy depends, it remains for us to present our own conclusions upon the more important of these questions, together with some of the considerations which have led to the results reached.

Perhaps the most important of all the questions presented for our determination is the one first discussed in appellant's brief. It is earnestly insisted that the bonds in question are absolutely void, on the ground they were issued and put in circulation in contravention of section 13 of article 11 of the present constitution, and also of section 22, chapter 114, Revised Statutes. The section of the constitution relied on provides, that "no railroad corporation shall issue any stock or bonds except for money, labor or property actually received and applied to the purposes for which such corporation was created; and all stocks, dividends, and other fictitious increase of the capital stock or indebtedness of any such corporation, shall be void." The section of the statute cited is almost a literal copy of the above provision of the constitution.

It is claimed that the evidence shows that the bonds in question, after having been prepared and executed by the company, were placed in the hands of Smith for the purpose of having them certified by Dennison, the trustee, as required by the provisions of the trust deed, and when thus certified to be returned to the company, and for no other purpose, and that the subsequent appropriation of them by Thompson, Griggs & Co. was without any warrant or authority from the company, but that, conceding the company's officers and agents assented to such appropriation, it affirmatively appears that the bonds, at the time of their delivery to them, were not given for either money, labor or property which had theretofore been actually received or applied to the purposes for which the company was created, wherefore it is concluded that the bonds are absolutely void, even in the hands of innocent holders.

Assuming, for the purposes of the argument, the facts to be as claimed by appellant's counsel, is the construction which they place upon this provision of the constitution the true one? It could hardly have been the intention of the framers of the constitution by this provision to prohibit the building of railroads altogether with means to be realized from the sale of bonds and stocks, and yet such would undoubtedly be its practical effect if the construction contended for is correct, for it is hardly reasonable to suppose that capitalists would advance money to build a railway upon the mere promise of the company at some future day, after the completion of the road, to issue bonds or stock for the money thus advanced. Nor is it at all probable, on the other hand, that promoters of railroad enterprises would undertake to build railways without present means to defray current expenses. This could not be done. Laborers, mechanics and material-men have to be paid in ready money, and this must be raised either by negotiating the bonds or stock of the company at the outset, or the contractors or promoters must advance it out of their own pockets, upon the faith of the company's being able, at some future day, to negotiate its bonds for the purpose of reimbursing them. This course would be so hazardous that no one would be safe in adopting it, and few, if any, prudent business men would be likely to do so. The negotiation of railway bonds depends so much upon the temper of the times and the state of the money market when they are offered, that none but men of unlimited means could safely commence the construction of a railroad under such circumstances. Men of moderate means, relying upon such resources, would, in cases of this kind, be exposed to the danger of being forced to abandon the enterprise altogether, after having exhausted their own private funds in the prosecution of the work, by reason of being unable to negotiate bonds for the work actually done.

Every railway company, when first organized, has neither money nor property of any description, outside of its stock, with which to build its road, hence, if it builds it at all, it must of necessity build it on a credit, unless it is built exclusively out of the proceeds of its stock; but even this could not be done under the construction contended for, because if that be the true construction, the company would be as powerless to negotiate its stock in advance of the work actually performed as it would its bonds. Both stock and bonds, it will be perceived, stand upon the same footing in this respect. Uniform experience shows that public and private interests alike demand that in the building of a railroad the means for that purpose should be fully and definitely provided before the commencement of the work, and this is especially necessary when the sale of the company's bonds or stock is relied on for that purpose, which, we may add, is almost universally the case.

But it is quite manifest that means to build a railway could not be thus raised in advance if the position of appellant is correct. Upon the hypothesis the construction in question is the proper one, the result would be this: Every share of stock and every bond issued by a railroad company in this State since the adoption of the constitution, is absolutely void in the hands even of an innocent holder, unless the same was issued in satisfaction of an existing liability of the company on account of money, labor or property previously received and applied to some corporate purpose. It is difficult, if not impossible, to fully estimate the consequences of such a holding. It is a matter of general notoriety, within the range of every man's knowledge of ordinary information, that a large proportion of the railroad bonds that are now upon the market in the hands of innocent holders, whose proceeds have been applied in establishing and building up the magnificent railway system in our State, were originally issued and sold upon the market before any con-

siderable amount of money, labor or property was expended in building the roads, or for other corporate purpose, and yet, if the construction contended for is to prevail, it would defeat all these bonds. Who has ever supposed that a dealer in railroad stocks, by virtue of the provision in question, can not with safety buy a single share of stock in any of the railroad companies of the State without first ascertaining and satisfying himself it was originally issued by the company in discharge of some existing liability on account of money, property or labor having been previously received and actually applied by the company to some corporate purpose? And yet such precaution would be necessary under the rule insisted on.

The very statement of the proposition affords ample evidence that such could not have been the intention of the framers of the constitution. The latter part of the clause of the constitution in question, which declares that "all stocks, dividends and other fictitious increase of the capital stock or indebtedness of such corporation shall be void," we think clearly points out the chief object which the constitutional convention sought to accomplish in adopting it, and to this we must look, in a large degree, for a solution of the language which precedes it. The object was doubtless to prevent reckless and unscrupulous speculators, under the guise or pretense of building a railroad, or of accomplishing some other legitimate corporate purpose, from fraudulently issuing and putting upon the market bonds or stocks that do not and are not intended to represent money or property of any kind, either in possession or expectancy, the stock or bonds in such case being entirely fictitious.

We can not believe it was intended by the provision in question to interfere with the usual and customary methods of raising funds by railroad companies for the purpose of building their roads, or of accomplishing other legitimate corporate purposes. To hold that such a company can not,

in good faith, issue its stocks or bonds for ready money to build its road, or to effectuate other lawful objects, is, in effect, to deprive it of the only means it possesses of carrying into effect the purposes of its creation. Under this provision of the constitution, railroad companies have no right to lend, give away, or sell on credit, their bonds or stock, nor have they the right to dispose of either, except for a present consideration, and for a corporate purpose. But in such case, if the company should subsequently divert the proceeds to other than corporate purposes, the purchaser of such stock or bonds, who has acted in good faith in the matter, can not be affected by the subsequent misappropriation by the company. To hold him or his assignee responsible for the application of the proceeds, would be to effectually destroy the usefulness and value of such securities. In short, we are of opinion that when one, for a present consideration, in good faith purchases bonds or stocks in the regular course of business from a railroad company, and such consideration is accepted by the proper officer of the company, and nothing appears to show that it is to be used or applied to other than legitimate corporate purposes, such bonds or stocks, when thus issued, will be regarded as having been issued for money, labor or property (as the case may be) "actually received and applied," within the meaning of the constitutional provision in question. Any other construction would lead to consequences of the most serious character, which could not have been intended by the framers of the constitution.

We do not at all question the general principle contended for by appellant's counsel, that negotiable securities issued without authority of law, or in express violation of a statute, are inoperative and void in the hands of even innocent holders; yet there is another rule of law equally well settled, namely, that although a contract entered into by the agents or officers of a private corporation is *ultra vires*, and therefore

not binding on the company so long as it remains executory, yet if the company in such case knowingly permits the other contracting party, without objection, to go on and perform the contract on his part, and thereby obtains and appropriates to its own use money, property or labor in furtherance of some legitimate corporate purpose, it will be estopped from denying its liability on such contract. *Bradley* v. *Ballard*, 55 Ill. 413; *Chicago Building Society* v. *Crowell*, 65 id. 453; *City of East St. Louis* v. *East St. Louis Gas Light and Coke Co.* 98 id. 415; *Darst* v. *Gale*, 83 id. 140.

The claim of appellant that the fifteen hundred bonds were simply sent to Smith for the purpose of having them certified by Dennison, and at once returned to the company, and that it was intended they should all be so certified and returned at the same time, and that Dennison had no right to certify six hundred of them and not the others, and that this was done without the knowledge or consent of the company, is inconsistent with the uncontroverted facts in this case. The claim, also, that the company was ignorant of the fact that these six hundred certified bonds were being used by Thompson, Griggs & Co., during the year 1873, after the interest had been guaranteed by the Indianapolis, Bloomington and Western Railway Company, is also inconsistent with admitted facts. The undisputed fact is, that more than a year after these bonds had been delivered to Smith, a member and the financial agent of the firm of Thompson, Griggs & Co., and after the work on the road had been entirely suspended, the company executed a perpetual lease of the completed portion of the road lying between Pekin and Peoria, to the Indianapolis, Bloomington and Western Railway Company, in which the latter company, as a part of the consideration of the lease, expressly undertook the payment of the interest on the six hundred bonds in question.

If these bonds were not regarded by the company as standing on a different footing from the remaining nine hundred

not certified by Dennison, how did it happen that the interest on them was provided for, and not on the others? No one connected with the railroad company could have been ignorant of the fact that Thompson, Griggs & Co. had already at that time expended of their own means in procuring the right of way, building the bridge and so much of the road as was then completed, an amount nearly, if not quite, equal to the full value of these bonds, and that they were then in the hands of that firm, and in justice belonged to them, even if there had never been any formal delivery of them. Under these circumstances we can not but regard the provision in the lease by which the lessee assumed the payment of the interest, as an official recognition on the part of the company of the fact that these bonds then represented an outstanding indebtedness against it. This being so, would it not be wholly inconsistent with every conception of equity to permit the company to now come into court and defeat a recovery on them, on the ground that there are some unadjusted equities between it and Thompson, Griggs & Co., or that there was never any formal delivery of them to that firm?

The fact is patent and uncontroverted that the road, including the bridge, was built, so far as it was built at all, exclusively with means advanced by Thompson, Griggs & Co., which are represented by the bonds now in suit. If the railroad company succeeds in defeating a recovery on the bonds, what is the result? Thompson, Griggs & Co. will have no claim upon the road, for they have already reimbursed themselves by a sale of the bonds to the present holders, and if the latter can not recover there can be no recovery at all, and the consequence is, the railroad company finds itself the absolute owner of an unincumbered railway, supposed to be worth about $50,000 a year, which has cost it comparatively nothing, while the bondholders, who ultimately furnished the money that built it, are turned out of court without a cent. If such is to be the result, it is certainly a

piece of model financiering on the part of the company, if we leave out of view the manifest injustice of the thing.

The company insists that it has sustained large damages by reason of the contractors' failure to complete the road to Springfield, and from other breaches of the construction contract, and it is earnestly contended, that even admitting these bonds were delivered by the company to Thompson, Griggs & Co., as claimed by appellee, still, under the rule of *Olds* v. *Cummings*, 31 Ill. 188, the holders of the bonds, so far as the deed of trust is concerned, took them subject to all equities the company may have against the contractors. The rule in that case rests, at least in part, on technical grounds, which have lost much of their force in more recent times by reason of the manifest tendency of judicial thought to an equitable standard, and while it is not intended to question the authority of that case, yet, for the reasons suggested, we do not think the principle should be extended to cases that are not clearly shown to be within the rule there announced. In the case of an ordinary mortgage or deed of trust to secure a temporary loan from one individual to another, the note or evidence of the indebtedness taken at the time, although it may be negotiable, is not given for the express purpose of being put upon the market and used as a permanent investment of capital, as in the case of railroad securities, nor does the mortgagee in such case, as a general rule, rely wholly on the security which the mortgage affords, as is always done in the case of railroad mortgage bonds.

In ordinary cases of the kind suggested, the mortgage is uniformly made for the benefit of some one specifically mentioned (usually the payee of the note), and the legal interest in such note is by operation of law vested in him, and can only be transferred to another by his indorsement, and the mortgage passes in equity, as an incident of the debt, by virtue of such indorsement. The case before us is unlike the ordinary one suggested, in several essential particulars. The

bonds in question are not payable to Thompson, Griggs & Co., nor is the trust deed, so far as anything appears on the face of it, made to them or for their benefit. Indeed, they are not so much as mentioned either in the bonds or the trust deed. On the contrary, the bonds are in express terms made payable to "the holder" of the bonds, and the deed of trust is expressly declared to be "*for the benefit, protection and security of the persons or corporations who shall hold the bonds about to be assured,*" etc. Thus it clearly appears that, so far as the record shows, Thompson, Griggs & Co. were total strangers to the transaction, and upon what principle any equities the company may have against them can be interposed so as to defeat the title of the present holders, is not perceived. It clearly can not be done. In short, we hold the doctrine of *Olds* v. *Cummings* has no application to deeds of trust given to secure railroad coupon bonds intended to be thrown upon the market and circulated as commercial paper, and to be used as securities for permanent investments. To hold otherwise would be doing violence to the manifest intention of the parties to such instruments, and would unquestionably lead to very disastrous consequences. It is true that a part of the reasoning by which our conclusion upon this question is reached in the present case, applies to some of the cases following *Olds* v. *Cummings*, but a review of those cases will clearly show that the present case may be distinguished from all of them in this, that both the deed of trust and the bonds, as we have already seen, show expressly upon their face that they were executed for the benefit of the holders of the bonds, whoever they might be.

The case of *Chicago, Danville and Vincennes Ry. Co.* v. *Loewenthal*, 93 Ill. 433, is cited as announcing a different view from that here presented. It is true that a part of the reasoning of the court in that case is not to be reconciled with what we have here said. It is sufficient, however, to say, with reference to that case, that what appears in the

opinion relating to this question was said *in arguendo*, and after the case had been decided upon another distinct ground, and without any argument of the question except upon one side. Under these circumstances, what was there said ought not to be, and is not, regarded as conclusive of the question, and upon more mature consideration of the subject we are fully satisfied the view now presented is the correct one.

The conclusions reached upon the questions already discussed render it unnecessary to consider the state of accounts between appellant and Thompson, Griggs & Co. Whether, upon a fair adjustment of their claims, there is anything due either way, is a matter in which the bondholders have no concern, since they can not be affected, as we have already seen, by any equities between them. For the same reason it is also unnecessary to consider other matters discussed by counsel in their briefs.

The decree orders a sale of the whole of the mortgaged property, both real and personal, tangible and intangible, absolutely and without redemption, and in this it is claimed there is error. This question is one of unusual importance and interest, and while it has frequently arisen in and been passed upon by the Federal courts of this State, yet, so far as we are advised, it has never before been directly presented to this court.

The right of redemption in any case is purely statutory, and whoever claims such right is bound to bring himself clearly within the provisions of the statute. The act of 1845 relating to this subject was in force at the time of the execution of the trust deed, and the rights of the parties, so far as this question is concerned, must be controlled by it. By the 15th section of chapter 57, of the Revised Statutes of 1845, it is provided, that when lands and tenements shall be sold on judgments at law, the defendants or others interested may, "within twelve months of such sale, redeem such lands or tenements by paying," etc., and by the 24th sec-

tion of the same chapter it is further provided, that "when lands shall be sold under and by virtue of any decree of a court of equity for the sale of mortgaged lands, it shall be lawful for the defendant or parties in interest to redeem the same in the manner prescribed for redemption of lands sold under judgments at law."

While it can not be seriously questioned that a railway track, considered without regard to its public character and the franchises usually connected with it, is "lands," or "lands and tenements," within the meaning of the above sections, yet the question here presented is, is a railway, its appurtenances and franchises, when legally mortgaged and ordered to be sold as an entirety, under a decree of foreclosure, lands or tenements, within the meaning of those sections? A number of reasons suggest themselves to us why they should not be so considered. In the first place, when a railway, its appurtenances, privileges and franchises are mortgaged as a whole, there is, in our opinion, no power or authority to sell them separately. From the very nature of the property one would be useless without the other. The franchise could not be used at all without the road, and the road could not lawfully be used, as against the State, without the franchise. Under such circumstances, to avoid the possibility of conflicting ownerships, the law has wisely determined that both must be sold as an entirety. *Chicago, Danville and Vincennes Ry. Co.* v. *Loewenthal, supra.*

While the franchise to construct and operate a railway is generally regarded as a grant of a part of the sovereign power of the State, partaking of the nature of a *quasi* public trust, yet it is also treated, particularly at the present time, as a species of intangible personal property, and by the 34th section of the Revenue act it is expressly required to be listed as such for the purposes of taxation. Now, while a railroad franchise, when considered by itself, will be treated as personal property, and the road itself, when so viewed,

will be treated as realty, yet when considered as an entirety, as they must be when so mortgaged and sold, they are, strictly speaking, neither the one nor the other, within the meaning of the law pertaining to redemptions. From a sale of land a redemption is allowed,—from a sale of personal property no such redemption is permitted; and since the two are indissolubly combined, by virtue of the mortgage, decree and sale, there is just as much reason, so far as the question depends upon the two kinds of property when separately considered, for contending the right of redemption is denied, as there is that it is given. And since it devolves on the party alleging such right to show a clear case within the statute, it follows that under the circumstances stated there would be no right of redemption.

But there are other considerations bearing on this question that should not be overlooked. In view of the public character of the road, it will not be questioned that the public generally have a direct interest in keeping it continuously open, without any material diminution of its capacity, to meet all the legitimate wants of the public. It is, therefore, but just and proper that the foreclosure proceedings should be conducted in such a manner, having due regard to the private interests of all parties concerned, as to cause the least possible injury or inconvenience to the public, and we are of opinion this will be more effectually accomplished by the method adopted than it can be in any other way. To have ordered a sale of the personal property separately, from which it is conceded there would be no redemption, and a sale of the realty with the right of redemption, as is claimed should have been done, it would most likely have resulted either in a sacrifice of the property, or some portion of it, or in embarrassing complications seriously affecting, at least for a while, the public interests. Moreover, it is difficult for us to believe that the wrecking of the property of a railroad company, and selling it out by piecemeal, would in any case

be for the best interests either of the public or those having an interest in its assets. It is also equally difficult for us to see how any one would be likely to pay anything like the present value of the property of a railroad company, even when sold as an entirety, where the right of redemption is reserved. However necessary, the purchaser in such case would not be safe in making anything like expensive repairs, or in increasing the carrying capacity of the road to meet the demands of business and travel, until after the time of redemption had expired. Besides, being out of possession during the fifteen months allowed to redeem, he would have no right even to make such repairs and improvements without the consent of those having the road in charge, and it is quite reasonable to assume if the railroad company saw it could not redeem, or if it had no intention of redeeming, it would make no such repairs, and the public might thereby suffer great inconvenience, and the road be seriously injured. But as before stated, this question has frequently been before the Federal courts in this State, and so far as we are advised those courts have uniformly held there is no redemption from a sale of this kind. So, whether the question is to be determined upon authority or upon grounds of public policy and convenience, we are of opinion the circuit court properly held there is no redemption from a sale of this kind.

Decree affirmed.

Mr. JUSTICE WALKER: I am unable to concur in holding the road could be sold without redemption. The opinion concedes that a large portion of the property was real estate, and the statute expressly declares such property shall be sold subject to redemption. That right was cut off by this decree, and it is therefore erroneous. It is true a Federal court in this State long held that on a foreclosure of a mortgage, in that court, the mortgagor was not entitled to redemption, but the doctrine was repudiated by the Federal Supreme

Court, and it required conformity to our statutes and our decisions. Again, I am unable to concur in overruling anything decided in *Chicago, Danville and Vincennes Ry. Co.* v. *Loewenthal, supra,* although it may be in the way of sustaining this decree. That case was deliberately decided, and I think was correct. The opinion is, in my judgment, opposed to the doctrine of *Peck* v. *Bligh,* 37 Ill. 317, *Melendy* v. *Keen,* 89 id. 395. *Mellendy* v. *Austin,* 69 id. 15, and *Olds* v. *Cummings,* 31 id. 188, and other cases following this last named decision, and I can see no reason for ignoring the doctrine they announce.

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ASAHEL GRIDLEY *v.* ALFRED S. BARNES *et al.*

and

THOMAS J. COX *v.* JOHN A. JAMESON.

Filed at Springfield March 28, 1882—Rehearing denied June Term, 1882.

1. LIMITATIONS—*action for statutory penalty—as, to enforce the liability of trustees and corporators of insurance companies.* The 14th section of the Statute of Limitations provides: "Actions for a statutory penalty shall be commenced within two years next after the cause of action accrued."

2. The liability of the trustees and corporators of insurance companies, arising under the 16th section of the general law in relation to insurance, approved March 11, 1869, is imposed, not as upon contract, but by way of a statutory penalty only. So a cause of action arising under that section is within the 14th section of the Limitation law, and will be barred after two years from the time it accrued, if suit be not brought within that time.

3. SAME—*effect of saving clause in acts repealing certain statutes of limitation—former decision.* The 14th section of the Statute of Limitations referred to is a part of the act approved April 4, 1872, and the 24th section of the same act (which repeals certain former acts of limitation) contains a saving clause, that "this section shall not be construed so as to affect any rights or liabilities or any causes of action that may have accrued before this act shall take effect." A cause of action arising under section 16 of the general Insurance law was not embraced in any of the statutes repealed by the

24th section. Prior to 1872 there was no general Limitation law in cases of actions for statutory penalties. So such causes of action are in no way affected by that saving clause.

4. In the case of *Dickson* v. *Chicago, Burlington and Quincy R. R. Co.* 77 Ill. 331, the saving clause in section 24 of the Limitation act of 1872 was construed as if the words "this act" had been used instead of the words "this section." This construction was given in respect to a cause of action embraced in the Limitation act of 1849, but the saving clause so construed does not affect causes of action not embraced in the statutes repealed by the 24th section. The 14th section will still be given effect as to preëxisting causes of action for a statutory penalty.

5. STOCKHOLDERS *in insurance companies—liability for corporate debts—under what law arising.* The 25th section of the charter of the Lamar Insurance Company, on the subject of the individual liability of stockholders in that company for debts of the corporation, is not to be understood as fixing any liability at all, but the entire section is one of limitation or restriction only,—that is, that the liability of the stockholder can not be extended by subsequent legislation beyond the limit therein prescribed. The liability of the stockholders in that company arises under the 16th section of the general law relating to insurance.

6. SAME—*former decision.* Nor is the case of *Arenz* v. *Weir*, 89 Ill. 25, to be understood as laying down any different rule. In that case the question whether section 25 of the charter imposed any such liability was not before the court. That section, together with art. 10 of the constitution of 1848, and the amendment of the charter of 1869, was referred to merely as showing that the legislature retained the constitutional right to impose upon the stockholders the liability as fixed by the 16th section of the general Insurance law.

APPEALS from the Appellate Court for the Third District;—heard in that court on appeals from the Circuit Court of McLean county; the Hon. OWEN T. REEVES, Judge, presiding.

Messrs. WILLIAMS, BURR & CAPEN, Mr. IRA J. BLOOMFIELD, and Messrs. WELDON & MCNULTA, for the appellants:

The Lamar Insurance Company having been in existence and doing business before the general Insurance law of 1869 was passed, the 16th section of that act can only be held applicable to a shareholder as a penalty for permitting the corporation to continue to do business, after the passage of

that act, in contravention of its terms. *Weidenger* v. *Spruance*, 101 Ill. 287; *Diversy* v. *Smith*, 9 Bradw. 437; *Gulliver* v. *Roelle*, 100 Ill. 141; *Cable* v. *McCune*, 26 Mo. 380; *Halsey* v. *McLean*, 12 Allen, 438; *Merchants' Bank* v. *Bliss*, 35 N. Y. 412; *Steam Engine Co.* v. *Hubbard*, 101 U. S. 108; Thompson's Liability of Stockholders, sec. 84; Sedgwick on Construction of Stat. and Const. Law, 32.

All actions for penalties are barred in two years. Rev. Stat. 1874, p. 675, sec. 14.

That the cause of action under section 16 of the general Insurance law, and that under section 25 of the company's charter, are different, one being on a contract and the other on a penalty, and are barred by different statutes of limitations, see *Corning* v. *McCullough*, 1 Comst. 47.

The Statute of Limitations continues to run against a new cause of action set up by way of an additional count, until such count is filed. *Illinois Central R. R. Co.* v. *Cobb*, 64 Ill. 128; *Illinois Central R. R. Co.* v. *Phelps*, 94 id. 548; *Showkegan Bank* v. *Cutler*, 49 Maine, 319; *German* v. *Judge*, 27 Mich. 139; *Hawthorn* v. *State*, 57 Ind. 286.

Mr. HAMILTON SPENCER, and Mr. W. S. COY, for the appellees:

We make no question as to the limitation in respect to statutory penalties. We are suing for no such penalty. The stockholder's liability is original, and is created by section 25 of the charter. The declaration was not framed upon section 16 of the general Insurance law.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

In these cases actions of debt were brought by the plaintiffs, against the defendants, as stockholders of the Lamar Insurance Company, to recover certain specified indebtedness of that company to the plaintiffs, respectively. So far as the questions to be considered are concerned, there is no

substantial difference between the cases. In both, the causes of action accrued more than two years before the bringing of suit, and under the stipulations of the parties the defence of limitation is properly before the court.

If we shall regard the liability of the defendants as resting on the 16th section of the general law in relation to insurance, which was approved March 11, 1869, and in force July 1, of that year, the causes of action are, as we think, clearly covered by the 14th section of the Statute of Limitations. Rev. Stat. 1874, p. 675. The 16th section of the general law in relation to insurance imposes a liability on the trustees and corporators of insurance companies, severally, for all debts or responsibilities of such companies, to the amount by him or them subscribed, until the whole amount of the capital of such company shall have been paid in, and a certificate thereof recorded, as provided in that act. In *Weidenger* v. *Spruance*, 101 Ill. 287, we held this liability upon the stockholders is imposed by way of penalty only; and the 14th section of the Statute of Limitations provides: "Actions for * * * a statutory penalty * * * shall be commenced within two years next after the cause of action accrued."

But counsel for the plaintiffs deny this suit is brought for a penalty, and say that it is brought under the 25th section of the charter of the Lamar Insurance Company. That section is as follows: "That no stockholder of the corporation hereby created shall be liable, in his individual capacity, for any debt or liability of said company beyond the amount of stock held by him, and it is hereby provided, that if the corporation hereby contemplated is not fully organized, according to the provisions hereof, within one year from and after the passage of this act, then this act shall be void." This plainly prevents the individual liability of the shareholder exceeding the amount of stock held by him, but it is quite as plain that it does not fix his liability to that amount. It

certainly contemplates that he may be made liable to that amount, but there is no attempt by this section to fix any liability whatever. The entire section is one of limitation or restriction only. A fair construction, undoubtedly, is, the stockholder may be made liable (not that he thereby is) to the amount indicated, and so he could not claim that a subsequent law fixing his liability to that amount, and prescribing a mode of enforcing it, impaired the obligation of his contract; and this was the view that obtained with the court in *Arenz* v. *Weir*, 89 Ill. 25.

But counsel contend that case is an authority for holding that this section imposes an absolute individual liability upon the stockholder, to the extent of the stock held by him, for any debt or liability of the company, and there is, unquestionably, language in the opinion in that case that, considered by itself, authorizes this view. But the language of the opinion must be considered with reference to the question under discussion. The question whether that section imposed such liability, was not before the court. The question was, whether the declaration was sufficient on demurrer, and it stated what was held to be a sufficient cause of action under the 16th section of the general law in relation to insurance. It was, on behalf of the stockholder, contended, that to apply the 16th section of the general Insurance law to him, was to impair the obligation of his contract on becoming a stockholder; and in answer to this, the 25th section of the charter, art. 10 of the constitution of 1848, and the amendment of the charter of 1869, were all referred to as showing that the legislature retained the constitutional right to impose upon the stockholders the liability prescribed by the 16th section of the general law, and all this is manifest by a careful reading of the opinion.

There being no other section of the charter of the insurance company, nor of the general law relating to insurance, under which a liability on the part of the defendants is

claimed, it follows the judgments below must be reversed and the causes remanded.

Judgments reversed.

Subsequently, upon an application for a rehearing, the following additional opinion was filed:

Per CURIAM: We have patiently, and with such care as we could bestow, reconsidered the questions presented by this record, and having done so, perceive no cause to depart from the conclusion announced in the opinion heretofore filed.

In *Diversey* v. *Smith*, and *Burkett* v. *Plankinton*, considered as one case at March term, 1882, (*post*, 378,) we have again considered the question of whether the liability under the 16th section of the general Insurance law of 1869 is on contract or for a statutory penalty, and reference may be made to those cases for a further and more elaborate expression of our views on that question.

It is insisted that the 14th section of the act in regard to limitations, approved April 4, 1872, has no application to this cause of action, because in the 24th section (which repeals certain former acts of limitation) a saving clause is added, saying: "But this section shall not be construed so as to affect any rights or liabilities or any causes of action that may have accrued before this act shall take effect."

In the opinion of this court in the case of *Dickson* v. *Chicago, Burlington and Quincy R. R. Co.* 77 Ill. 331, it was said, in relation to this section: "The legislature saw proper to expressly repeal the act of February 10, 1849, and not leave it to be repealed by implication, and to expressly apply a saving clause to the repeal." And it was added: "We are of opinion the construction is to be the same as if the words 'this act' instead of 'this section' had been used."

Counsel lay great stress on this last remark, but it must be observed that these words were used in relation to a cause of action embraced in the act of 1849, and governed by this

statute, and as to such causes of action already accrued the remark is strictly accurate. The words must be limited to that class of cases. The substance of what is there said is, that the express repeal of the old statutes of limitation repels the idea of repeal by implication, and the saving clause means causes of action already accrued shall continue to be controlled by the former statutes, and this, notwithstanding the express repeal. And so, as to such causes of action, the legal effect of the saving clause is the same as if the words "this act" had been used instead of the words "this section." Such, however, is not the legal effect of that saving clause upon causes of action not embraced in the statutes repealed by that section. The cause of action in the case at bar is not embraced in the statutes repealed by section 24, and is in no way affected thereby, but it is within the terms of section 14 of that act, and is controlled thereby.

Again, in the revision of 1874, section 14 is remodeled, and section 24 of the act of 1872 is omitted entirely, (Rev. Stat. 1874, p. 675,) and in chap. 131, sec. 5, the former statutes of limitations are repealed with a saving clause saying: "When any limitation law has been revised by this or the Twenty-seventh General Assembly, and the former limitation law repealed, such repeal shall not be construed so as to stop the running of any statute, but the time shall be construed as if such repeal had not been made." This is the law in force from that time until now. It is thus seen that the repeal of old statutes and the saving clause relating thereto have no relation to the case at bar, inasmuch as prior to 1872 there was no general Limitation law in cases of actions for statutory penalties.

This view does not give the statute a retroactive effect, for more than two years had elapsed after the passage of the statute before the bringing of either suit.

Rehearing denied.

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BENJAMIN H. BRAINARD *et al.*

v.

E. G. HUDSON *et al.*

Filed at Springfield March 22, 1881—Rehearing denied June Term, 1881.

1. RENTS AND PROFITS—*as between mortgagor and mortgagee—in case of joint occupancy.* A mortgagor and mortgagee farmed the mortgaged premises upon shares,—the mortgagee being in possession, and the mortgagor, the son of the mortgagee, residing with his father. The latter, in the cultivation of the farm, furnished most of the teams, boarded the hands, and the crops were equally divided. Upon bill to foreclose the mortgage, it was *held*, that during the time the mortgaged premises were cultivated upon the joint account of the mortgagor and mortgagee, the latter ought not to be charged with rents.

2. PRACTICE—*time to object to master's report.* Upon reference to the master to state the account, in a suit to foreclose a mortgage, if the action of the master is not satisfactory, the party objecting should appear before the master and file exceptions to the report, and, if overruled by the master, the exceptions disallowed, together with the evidence bearing on the same, will be filed by the master in the court in which the suit is pending, where a hearing can be had before the court, and the decision of the court may be questioned upon error or appeal. Objection to the master's report can not be taken, in the first instance, in a court of review.

3. POSSESSION—*as notice of rights under unrecorded deed or mortgage.* Where a person is in possession of land under an unrecorded deed, that possession is notice to all subsequent purchasers or incumbrancers of whatever title is held by the person in possession, to the same extent as if his deed were duly recorded, and a subsequently acquired title, although first on record, will be held subject to the title which the person in possession may have to the property. This rule applies as well to possession held under an unrecorded mortgage.

4. SAME—*effect of possession by widow and heirs of mortgagee.* Where a mortgagee of lands dies while in the actual occupancy of the same, the possession being continued in his widow and heirs, the possession of the latter will afford the same notice to subsequent purchasers and incumbrancers as respects rights existing under the mortgage, as though the mortgagee himself were still living and in possession.

5. So where the mortgagor, in such case, made a second mortgage on the same premises, after the death of the prior mortgagee, but while the widow and heirs of the latter were still in possession, the second mortgagee took subject to the prior mortgage although the same was unrecorded.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on writ of error to the Circuit Court of Logan county; the Hon. CYRUS EPLER, Judge, presiding.

MESSRS. BEASON & BLINN, for the plaintiffs in error.

Mr. N. M. BROADWELL, for the plaintiff in error Brainard.

Mr. E. LYNCH, MESSRS. HOBLIT & STOKES, and Mr. E. G. HUDSON, for the defendants in error.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

On the 11th day of April, 1866, John L. Primm, being the owner of a certain farm in Logan county, consisting of one hundred acres of land, and also thirty acres of timber land near the farm, conveyed the property, by deed of that date, to his son, James H. Primm, for the expressed consideration in the deed of $5000. The deed was recorded April 13, 1866. At the time the deed was executed and delivered, James H. Primm gave John L. Primm a mortgage on the land to secure the payment of the purchase money, $5000, according to the tenor and effect of five promissory notes, for $1000 each, due in one, two, three, four and five years, with interest after due at ten per cent. This mortgage was not recorded until after the bill was filed. John L. Primm, however, remained in possession of the farm until December 2, 1873, when he died intestate. On the first day of October, 1874, James H. Primm borrowed of Benjamin H. Brainard $2500, and gave a trust deed on the farm to secure the payment thereof, which was placed on record the day it was executed. This bill was filed by the administrator of the estate of John L. Primm, deceased, against James H. Primm, Benjamin H. Brainard, and others, to foreclose the mortgage given to John L. Primm on the 11th day of April, 1866.

Two questions are presented for our consideration by this record. The first arises on the master's report, to whom the cause was referred, and who stated the account between the parties. The second question presented is, whether the mortgage given to Brainard, although subsequent in date, is entitled to priority over the mortgage given to John L. Primm, for the reason it was first on record.

It appears that the mortgagee, John L. Primm, occupied the premises from the time he conveyed to his son, continuously, to the date of his death. During this time the mortgagor made several payments on the notes, and he also claimed that the rent of the premises should be applied as a payment on the mortgage. Four hundred and twenty dollars of the money loaned by Brainard to James H. Primm was used to pay off a mortgage on the premises which had been executed by both the Primms to one Lucy Wright, after James H. Primm had obtained a deed from his father. In stating the account Brainard claims that the $420 should not be applied as a payment on the Primm mortgage, but as he advanced the money to relieve the premises from a mortgage lien, in equity he should be subrogated to the rights of Lucy Wright in the mortgage which she held, and which his money paid off. The court, in order to adjust the account between the parties, referred the cause to the master to state an account between them. The master, after taking the proofs of the respective parties, stated an account, and after allowing various payments in rents and moneys on complainant's mortgage, found there was still due thereon $3442.76, February 6, 1879. The $420 paid by James H. Primm to Lucy Wright, to discharge her mortgage, was allowed by the master as a payment on complainant's mortgage of date October 3, 1874, the time when the money was paid. In stating the account the master allowed no interest on complainant's notes until April 11, 1869, nor did he charge complainant with the rents until that time, and no rents were allowed

after the death of John L. Primm. The report of the master, after having been examined by the court, was approved, and this decision of the court is relied upon as error.

It is contended that the master ought to have charged complainant with the rent of the land from 1866 to 1869, and that the sum of $420, paid Lucy Wright in satisfaction of her mortgage out of the money Brainard loaned, should not have been credited on complainant's mortgage, as was done by the master, but that Brainard should, in any event, have been subrogated to the rights of Mrs. Wright in the premises to the extent of $420, and decreed a prior lien for that amount. While the mortgagee occupied the premises from 1864 to 1869, yet we do not think he should in this proceeding be charged with rents during that period, as it is apparent from the evidence that during those years James H. Primm lived with his father, and the farm was cultivated on shares. The father furnished most of the teams, boarded the hands, and the crops were equally divided. We shall not, however, stop to determine whether the statement of the account by the master was correct or incorrect. The plaintiffs in error filed no exceptions to the master's report, either before the master or in the circuit court. So far as appears, no objection whatever has ever been made to the report until the case reached the Appellate Court. The objections now made to the statement of the account by the master come too late. If the account was not properly stated, plaintiffs in error ought to have appeared before the master and filed exceptions to the report, and if they were overruled by the master, the exceptions disallowed, together with the evidence bearing upon the same, would have been filed by the master in the circuit court, where a hearing could have been had before the court, and if disallowed there, the decision of the court could be assigned for error on appeal. *Brockman* v. *Aulger*, 12 Ill. 277; *Reigard* v. *McNeil*, 38 id. 400; *Pennell* v. *Lamar Ins. Co.* 73 id. 303.

We now come to the other question in the case. The court, in the decree, made the mortgage given to Brainard subject to the one given to John L. Primm. If Brainard had no notice of the existence of the Primm mortgage, or no notice of any fact which would be sufficient to put a prudent person upon inquiry, he would be entitled to protection, although his mortgage was executed some years after the one given to John L. Primm. Where a person is in the possession of a tract of land under an unrecorded deed, that possession is notice to all subsequent purchasers or incumbrancers of whatever title is held by the person in possession, and a subsequently acquired title, although first on record, will be held subject to the title which the person in possession may have to the property. Here, from 1866, when the land was conveyed to James H. Primm, John L. Primm was in the open and notorious possession of the property until his death, December 2, 1873, and after his death the possession was continued by his widow and minor children until long after the mortgage was made to Brainard. From 1864 to 1869 James H. Primm lived with his father on the farm, and cultivated it on shares. In 1869 James left the farm and moved on another place. At this time James had paid little or nothing on the farm, and what arrangement was made between him and his father in regard to the terms under which the land was to be occupied, is not very clear from the evidence. This much, however, is apparent, that John L. Primm held the possession from 1869 under the mortgage executed to him by James, and it seems to have been understood that the rent of the farm should be applied on the mortgage debt. While John L. Primm occupied the farm under his mortgage, whether the mortgage was on record or not, a subsequent purchaser or mortgagee from James would take with notice. Had he been in possession under an unrecorded deed, his possession would have been notice of whatever title he held under such deed, and we perceive no substantial distinction

between a possession held under an unrecorded deed and a possession held under an unrecorded mortgage. The same principle which would protect the person in possession under one would afford protection under the other.

We had occasion in *Coari* v. *Olsen*, 91 Ill. 273, to discuss somewhat the effect of a possession of real property held under an unrecorded instrument as against a subsequent purchaser, and it was there said: "Although other courts have held the doctrine of notice by possession as subject to being materially modified by circumstances, this court has uniformly held that actual occupancy is equal to the record of the deed or other instrument under which the occupant claims, and a purchaser is bound to inquire by what right or title he holds. The purchaser takes the premises subject to that title or interest, whatever it may be."

Had Brainard obtained his mortgage while John L. Primm was in possession of the land, and before his death, it seems clear that such mortgage could not be held to have priority over the unrecorded mortgage held by Primm. Brainard's mortgage was not, however, executed until after the death of Primm, but we do not think this fact bettered Brainard's condition. The character of the possession of the property was in no manner changed by the death of Primm. The widow and children of the deceased continued to occupy the premises after his death in the same manner that he had done before, the widow, as she testified, holding the notes and mortgage in her possession. The legal representatives of John L. Primm, the mortgagee, had the right to hold the possession of and occupy the farm until the mortgage debt was paid, however long that might be; and while the premises were thus occupied under the mortgage, a subsequent grantee of the mortgagor could take subject only to such prior mortgage. It is doubtless true that the title to the notes secured by the mortgage upon the death of Primm passed to his administrator, but that does not materially

affect the question. Under the mortgage the legal title to the premises, upon the execution and delivery of the mortgage, passed to John L. Primm, the mortgagee, and upon his death this title would at law pass to his widow and heirs, and as their possession of the premises was notice of whatever title they had, when Brainard took a mortgage he took with notice of the unrecorded mortgage, and whatever rights he acquired in the premises must be held subject to the prior mortgage.

We are of opinion that the decree of the circuit court was right. The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

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SANDERS A. OSBORN

v.

THE PEOPLE *ex rel.* Thomas A. Lewis, for use, etc.

Filed at Springfield May 12, 1882.

1. EVIDENCE—*to show title or want of title.* The want of title in a person can not be proved by verbal testimony. To prove title, or the want of title, the best evidence must be produced, or its absence properly accounted for to admit secondary evidence. The opinions of witnesses are not competent to prove that a person is not a land owner.

2. CORPORATION—*organization can not be attacked collaterally.* The legality of the organization of a corporation can be attacked and judicially examined only in a direct proceeding by *quo warranto.* It can not be inquired into in a collateral proceeding, such as a suit by the corporation.

3. PLEADING AND EVIDENCE—*proof necessary on plea of nul tiel corporation.* The plea of *nul tiel corporation* is a proper plea in a suit by a corporate body, when it is denied there is any such body, but under that plea it is sufficient for the corporation to prove that it is known and transacts business under the corporate name in which the suit is assumed to be brought, or is a corporation *de facto.* It is not necessary under such plea in such suit to show that the plaintiff is a corporation *de jure,* as in case of a *quo warranto.*

Brief for the Appellant.

APPEAL from the County Court of Champaign county; the Hon. J. W. LANGLEY, Judge, presiding.

Mr. J. O. CUNNINGHAM, for the appellant:

There was no legal organization of a drainage district, for the reason that a majority of the adult owners of land did not sign the petition. The statute evidently requires that the legal owners shall sign the petition. Hurd's Stat. 1881, pp. 458, 467.

The assent of a majority of the owners of the land in the proposed district to the formation of a corporation with unlimited powers of assessment, was intended to be fundamental and jurisdictional. *Bostwick* v. *Skinner*, 80 Ill. 147; *Iverson* v. *Loberg*, 26 id. 179.

The assent, in the form prescribed by the statute, of those to be assessed, is to be regarded as a condition precedent, which can not be dispensed with, and a want of compliance with this requirement is fatal at any stage of the proceedings. *People* v. *Mayor*, 51 Ill. 17; Cooley on Taxation, 464.

It has always been held that this power in the legislature is subject to the limitation that a local burden can not be imposed without the consent of the people to be affected. *Directors* v. *Houston*, 71 Ill. 323; *Updike* v. *Wright*, 81 id. 50.

The finding of the commissioners that a majority of the land owners had united in the petition, is only *prima facie*, and may be disproved. Cooley on Taxation, 465. See, also, sec. 5 of the act.

It is a familiar principle that in summary proceedings, which may result in divesting title, the law is to be strictly construed, and nothing is to be taken by intendment. *People ex rel. Miller* v. *Otis*, 74 Ill. 384; *Mix* v. *People ex rel. Pierpont*, 72 id. 241; *National Bank* v. *Cook*, 77 id. 623; *City of Chicago* v. *Rock Island R. R. Co.* 20 id. 290; *Chicago* v. *Wright*, 32 id. 192.

To constitute an officer *de facto*, there must be some color of right to the office. *Pritchett* v. *People*, 1 Gilm. 529.

And there must be a *de facto* public office, and not a private affair, as in this case. There is a marked distinction between a *de facto* public officer whose acts concern the public, and a mere usurper of the office of a private corporation. *F. R. Co.* v. *G. J. R. & D. Co.* 1 Allen, 562.

Mr. WILLIAM B. WEBBER, for the appellees:

The legal existence of a corporation, and the acts of its officers, when they concern the public or the rights of third persons, can not be inquired into in a collateral proceeding. *Alderman* v. *School Directors*, 91 Ill. 199; *Trumbo* v. *People*, 75 id. 562; *Village of Nunda* v. *Village of Chrystal Lake*, 79 id. 311; *Baker* v. *Backus*, 32 id. 79; *Renwick* v. *Hall*, 84 id. 162; *President and Trustees* v. *Thompson*, 20 id. 199; *Kettering* v. *City of Jacksonville*, 50 id. 39; *Town of Geneva* v. *Lake*, 61 id. 397; *Village of Hyde Park* v. *Boyden*, 94 id. 26.

The remedy for an over-valuation is by an application to the assessor, and not to the courts, where there is no fraud. *Howe* v. *City of Boston*, 7 Cush. 273; *Osborn* v. *Danvers*, 6 Pick. 98; *Boston Water Co.* v. *Boston*, 9 Metc. 199; *Bank of Shawneetown* v. *Cook*, 77 Ill. 622; *Adsit* v. *Cook*, 76 id. 198.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a proceeding for the collection of an assessment for drainage purposes, commenced to the May term, 1881, of the Champaign county court, against the land of appellant.

On the 24th of December, 1879, William R. Sullivan and nineteen others filed with the town clerk of St. Joseph township a petition, addressed to him, representing themselves as a majority of the adult land owners of a proposed drainage district, described by metes and bounds. The steps required by the statute for the organization of drainage districts were

pursued and the district formed, the assessment made, and not having been paid, application was made to the county court for judgment, which was rendered for the sale of appellant's lands for payment of the assessment.

It is not claimed that any of the forms required by the statute for organizing such districts have been omitted. It is, however, sought to show that a number of the petitioners are not owners of lands, as required by the statute,—that if their names were rejected there would not be the number of petitioners required by the statute,—and the district was never organized as required by the statute, and the assessment was therefore unauthorized and void; that there is no such organization as the drainage district, and it is incapable of exercising corporate powers.

Even if the validity of the organization of a corporation could be attacked in a collateral proceeding, the rules of evidence do not permit the proof of the want of title to land by verbal testimony. The title to real estate is required to be in writing, under seal, and all know that the contents of such instruments can not be proved by verbal testimony unless the original is lost or destroyed. The best evidence must be produced, and secondary evidence can not be admitted unless the best is not attainable. Title, or the absence of title, can not be proved by verbal testimony so long as there is written evidence. Here there was an attempt to prove the want of title by persons that may be wholly unqualified to determine what constitutes title. In many cases the best land lawyers and most skillful conveyancers are perplexed to determine whether a title is or is not perfect. This illustrates the wisdom of the law in requiring the evidence of title to rest in writing, and all questions as to the validity of the title to be determined by courts when contested, and not by persons unskilled as to what constitutes title. Men would be insecure in their possessions if their title depended on the opinions of their neighbors, whether educated or illiterate. The rules of

evidence were violated in this case by admitting the mere opinions of witnesses to prove title in this case. This is the general rule, and it was not complied with, nor was there any effort to bring the case within any exception to that rule.

But aside from all of this there is an absolute want of power in the court to hear evidence in a collateral proceeding like this, for the purpose of determining whether a corporation is legally organized. That can only be done by *quo warranto*, which is a direct proceeding to determine its validity. This, from the nature of things, must be so, otherwise no question could ever be adjudicated. Every proceeding before tribunals and officers, if permitted, would lead to an inquiry whether they were legally acting. If it were permitted, in every suit before all courts, from the highest to the lowest, the defendant might question the election of the judge and enter into a contest of his election. In all suits by the State its organization might be reviewed and decided. In suits by counties it might be claimed that the law authorizing their organization had not been complied with, and efforts made to show a want of compliance with the law. It would lead to an inquiry whether the territory comprising a county had the requisite population to organize; whether the proper notices for elections had been given, and other statutory requirements performed; and the same would follow as to every municipal corporation, and the election of every officer, before his acts would be regarded as legal. If this was allowed, in every constitutional question for determination, the courts would, if insisted upon, be compelled to hear evidence and determine whether all of the required steps were taken in calling the convention that framed it, or in giving notice and conducting the election that adopted it, and canvass the vote, purge the polls, and recount the votes, to determine whether all of the requirements of the law were satisfied. Thus it is seen that the highest considerations of public

policy forbid the inquiry whether a corporation is legally organized in any but a direct proceeding.

It is true that the plea of *nul tiel corporation* is a proper plea, when a suit is brought by a corporate body, when it is denied there is such a body. But under that plea it is overcome when the corporation proves it is known and transacts business under that name. That plea does not question the legality of its organization, and require it to prove the same facts it would be required to do in a proceeding by *quo warranto*. Whether it is a corporation *de facto* or *de jure*, does not matter when it sues to enforce a right.

The legality of the assessment not being otherwise questioned, and the questions urged having no force, the judgment of the court below is affirmed.

Judgment affirmed.

JOHN SEELEY WALLACE

v.

CYTHERA M. RAPPLEYE *et al.*

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Filed at Springfield March 28, 1882—Rehearing denied June Term, 1882.

1. HEIRSHIP—*by contract—in respect to illegitimate child—degree and character of proof required.* Where there is an attempt to establish a verbal contract alleged to have been made by the putative father to make his illegitimate child an heir, by the testimony of the mother and other relations of the child alone, the evidence should be looked upon with great jealousy, and it should be weighed in the most scrupulous manner, to see what is the character and position of the witnesses generally, and whether they are corroborated to such an extent as to secure confidence that they are telling the truth. Such claims are always dangerous, and when they rest on parol evidence they should be strictly scanned, especially when an attempt is made, under cover of a parol contract, to effect a distribution different from that which the law makes.

2. SAME—*adoption of child so as to confer the right of inheritance—requirements of the statute.* Under the statute, where there are husband and wife, the wife's interest as respects herself or her children in the right of

inheritance can not be affected by any act of adoption by the husband alone of another's child than their own, giving it the right of inheritance, but there must be consent of the wife thereto.

3. SAME—*contract as to heirship of legitimate child—without notice of a prior agreement.* Where a divorced husband, in consideration of the release of dower by his former wife in all his lands, covenanted with her that on his death his and her son should receive the portion of the covenantor's estate that he would be entitled to by the laws of the State as a lawful heir, it was *held*, that such covenant was binding, and was a bar to any relief in equity on behalf of an illegitimate child of the covenantor, claimed under an alleged prior verbal promise by him to the mother of such child to make the latter an heir. To affect the mother of the lawful heir, or what she purchased by her contract, she must have had notice of the prior agreement. She not having notice, her child would hold the favorable position of an innocent purchaser for value, without notice.

4. SPECIFIC PERFORMANCE—*degree of proof of verbal contract.* A specific performance of a verbal contract respecting real estate will not be decreed, except upon clear and conclusive proof of its existence and terms. The proof must be clear and explicit, leaving no room for reasonable doubt, and the contract must be certain, equal and fair.

5. SAME—*of the nature of the contract—and the consideration.* To make a contract the basis of a decree for specific performance, it must be certain, fair and just in all its parts, and be founded upon a valuable, as distinguished from a merely good or moral, consideration.

6. SAME—*unfairness, to defeat specific performance.* A contract of a putative father with his participant in adulterous intercourse, by which to deprive the injured wife and her lawful children of their rights of inheritance, and bestow them in whole or in part upon the spurious offspring of their adulterous intercourse, will not be specifically enforced by a court of equity, to the prejudice of the father's lawful heirs.

7. SAME—*matter of discretion—uncertainty—change of circumstances.* The specific performance of a contract, even when satisfactorily proven, is not a matter of right in the party, but a matter of sound discretion in the court, which grants or withholds relief according to the circumstances of each particular case. The uncertainty of a contract to make one an heir, as to the amount of the party's property to be affected, is a circumstance to be considered by the court in exercising this discretion, and so a change of circumstances in the parties may be considered.

8. CONSIDERATION—*illicit cohabitation.* An agreement in consideration of future illicit cohabitation between a man and a woman is void, and past cohabitation does not form an adequate consideration for a promise not under seal, even if it does when made under seal.

9. SAME—*of contract to support illegitimate child, and make it an heir.* A promise by a putative father to support his illegitimate child, may be

supported and sanctioned from his legal liability for such support, but there being no legal liability to make such child an heir, a promise or agreement to do so, made with the mother, must have a valuable consideration for its support. In such case the surrender of the child by the mother to the father, to be provided for, being beneficial to the mother rather than detrimental, and an inconvenience to the father, does not constitute a valuable consideration for an agreement of the father to make the child his heir at law.

10. STATUTE OF FRAUDS—*acts of the party in performance.* A court of equity interferes to enforce a contract within the Statute of Frauds only where there has been such acts of performance by the party asking relief, that he would suffer an injury amounting to a fraud by a refusal to execute the agreement. The right to relief in such cases rests not merely on the contract, but on what has been done in pursuance of the contract, and to prevent fraud.

11. The acts of a party, to take a case out of the Statute of Frauds, must clearly appear to have been done with a view to the agreement and upon its faith, and be such as would not have been done except for the agreement, and with a direct view to its performance. If the acts relied on might as well have been done with other views, and without the contract, they will not have the effect to take the case out of the statute.

12. SAME—*application of rule to particular case.* So, where, after an alleged parol agreement on the part of a father of an illegitimate child with the mother, to take and support the child and make it his heir, the mother gave up the child, which the father took and provided for, it was *held*, that the act of the mother in surrendering the custody of the child might as properly be referred to the father's agreement to take it and care for it in his own family as to his promise to make it his heir, and being for the mother's benefit, she could sustain no injury amounting to a fraud by a refusal to make the child an heir, and that such act of performance by the mother did not take the case out of the Statute of Frauds.

13. BASTARDY—*contract in respect to the child—as a bar.* In the absence of any settlement or release in respect of a matter of bastardy, a contract on the part of the putative father, with the mother, in anticipation of the birth of the child, that the father would adopt the child and make it his heir, would be no bar to a bastardy prosecution, or to an action for damages, in respect thereto.

APPEAL from the Superior Court of Cook county; the Hon. GEORGE GARDNER, Judge, presiding.

The appellant, John Seeley Wallace, a minor, by his guardian, Thomas Lord, on April 24, 1879, filed his bill for partition of real estate, against Frank R. Wallace, in her own right and as one of the administrators of their father's

estate, and Albert P. Smith, the other administrator. The property in question descended to John Seeley and Frank R. Wallace from their father, John S. Wallace, who died intestate, December 25, 1878. Frank R. Wallace answered the bill, and alleged that Cythera M. Rappleye was a tenant in common of the real estate, and filed a cross-bill containing the same statement, and that she had executed a deed conveying to Mrs. Rappleye an undivided one-sixth of all the estate left by John S. Wallace, and making Cythera M. Rappleye, and her husband, Nicholas B. Rappleye, defendants. Mrs. Rappleye filed an answer and a cross-bill, alleging that John S. Wallace was, during his life, married to three different women,—to Harriet E. Bivens, June 25, 1834, who died in 1853; to Sarah M. Rich, August 15, 1853, who died in 1857; to Celia W. Whipple, February 28, 1865, who was divorced from him April 9, 1872; that Frank R. Wallace was daughter by Sarah M., the second wife, and John Seeley Wallace, complainant in original bill, was son of decedent and Celia W. Wallace, his third wife, and that complainant in the cross-bill was born March 7, 1845, when deceased and Harriet E. Bivens were husband and wife, residing and cohabiting together at Valparaiso, Indiana, and that her father was John S. Wallace, deceased, and her mother Jane Slover, an unmarried woman; that decedent executed and delivered to complainant the following instrument in writing:

"MRS. CYTHERA M. RAPPLEYE,

Wife of Nicholas B. Rappleye.

"MY DEAR DAUGHTER: You were brought to me when an infant, and adopted as my daughter, with all the formality, as I believed, which was necessary to make you my lawful child, and entitled to be regarded as such. To show my unchanging affection for you, and my desire that no question may ever arise on this subject, I voluntarily, and with pleasure, declare you to be my daughter as much as if you were

so born, and I expressly desire that no question may ever be made relative to your rights as such. To this declaration I set my hand and seal, at Chicago, Illinois, this 27th day of February, A. D. 1877.

J. SEELEY WALLACE. [SEAL.]"

The cross-bill further alleges that an agreement was entered into between Mr. Wallace and her mother, Jane Slover, in which Mrs. Wallace concurred, in which agreement Jane Slover, on her part, agreed, in consideration of the promises then made by Wallace to her on his part, to surrender the custody, control and education of the child about to be born, to the said Wallace and his wife, Harriet E., and thereafter make no claim to the custody or control of the child, and in consideration of said promises, and of the fact that he was the father of complainant, and liable for her maintenance under the statute of Indiana, and to an action for damages, Wallace, on his part, promised Jane Slover that he would receive the child into his family and adopt it as his own child, and thereafter would educate and treat it as his own child born in lawful wedlock; and further, that the said child should be an heir, and receive such share of the real and personal property as he might be seized or possessed of at the time of his death, as if she had been the lawful child of himself and wife. The bill prays that her right may be ascertained, and a decree entered enforcing said agreement.

The answer of John S. Wallace, Jr., by his guardian, admits the giving of the paper of February 27, 1877, but denies that it was intended to interfere with the rights of the lawful children, and denies the agreement alleged in the cross-bill. By way of further defence he sets up an agreement made on the 10th day of April, 1872, between Mrs. Wallace, the mother of the respondent, and John S. Wallace, as follows:

"Whereas, on the 10th day of April, A. D. 1872, a decree was entered in the Superior Court of Cook county, on the chancery side thereof, in which Celia W. Wallace was complainant, and John S. Wallace was defendant, in and by which the marriage contract heretofore existing between said parties was decreed to be null and void, and in which said suit it was also decreed that said John S. Wallace shall secure to said Celia W. Wallace the sum of twenty thousand dollars ($20,000) upon certain real estate in the city of Chicago, payable in ten years, with interest semi-annually, at eight (8) per cent per annum. And whereas, said John S. Wallace is also to pay said Celia W. Wallace the sum of six thousand five hundred dollars ($6500) in cash, as alimony to said Celia W. Wallace, and in part consideration for the release of dower in the estate of said John S. Wallace, as well as for the maintenance of John S. Wallace, Jr., the son of the said John S. and Celia W. Wallace, the custody and care of said child being given to said Celia W. Wallace, and also for solicitor's fees and expenses incurred by said Celia W. Wallace in said suit:

"Now, therefore, in consideration of the foregoing payment, the said Celia W. Wallace is to quitclaim and release all her dower rights and interests in and to all the property of said John S. Wallace, wherever the same may be situated, and in consideration of the foregoing release, and for the purpose of composing the differences heretofore existing between the aforesaid parties, and to meet the wishes of the said Celia W. Wallace, the said John S. Wallace does hereby covenant and agree that any property, real or personal, of which he may be possessed at the time of his death, shall be so divided that his said son, John S. Wallace, Jr., shall have the same amount or portion of any and all such property belonging to said John S. Wallace at the time of his decease, as the said John S. Wallace, Jr., would take under the law of Illinois were said John S. Wallace to die intestate, and that the said

John S. Wallace, in any will now existing or hereafter executed by him, shall insert a devise or bequest in form proper to render the same effectual in favor of his said son, devising and bequeathing to him at his, said John S. Wallace's, death, the share and proportion of his estate, real and personal, hereinbefore specified, it being expressly understood that this agreement is not to be construed as the creation of a trust or use, present or future, in favor of said John S. Wallace, Jr., upon or in any estate which may now or hereafter belong to said John S. Wallace. It is also understood that the agreement shall in no way prevent the said John S. Wallace from making transfers, conveyances, sales, or other disposition of any property that he may now or become hereafter seized or possessed during his lifetime.

(Signed) JOHN S. WALLACE. (L. S.)"

The answer alleges that Celia W. Wallace did, at the time of entering into said agreement, execute and deliver to said John S. Wallace deeds of release of all her dower right in all the property of said Wallace, the total value of his property being about $500,000, and his real estate $300,000. The Statute of Frauds and Perjuries was also set up.

Upon the hearing the Superior Court of Cook county made a decree establishing the claim of Mrs. Rappleye to one-third of the estate, as claimed in her cross-bill. John Seeley Wallace, by his guardian, appeals from the decree.

It appears in the case that in the year 1844 one Jane Slover, a girl of fifteen or sixteen years of age, was living in the house of John Seeley Wallace, in Valparaiso, Indiana, employed as a hired girl in the family. Wallace had a wife, but no children. There was a criminal intimacy between Wallace and the girl, and near the end of the year 1844 it was ascertained that a child would be the result. Wallace made an arrangement for Jane to go to Chicago to give birth to the child, and all the expenses were borne by him. About the first of January, 1845, Jane was taken by her father to

Chicago, in pursuance of the arrangement made by Wallace. At this place, on the 7th of March, 1845, the child was born. It was left there, and Jane returned to her friends at Valparaiso. A short time after, Wallace and his wife went to Chicago, where they obtained the child, and took it home with them to Valparaiso. The child was thus received into the family and thereafter treated as a lawful child and daughter, and as such grew to womanhood in the family. The name of Cythera M. Wallace was given to her, and an entry was made by Wallace, in his own handwriting, in the family record, that Cythera M. Wallace was born March 7, 1845, and was the daughter of J. S. and H. E. Wallace. It seems to have been generally understood at Valparaiso that she was an illegitimate child. She was married November 9, 1864, to Nicholas B. Rappleye. Jane Slover married about a year after the birth of the child, and afterwards went to Kansas. Wallace, who had removed to Chicago, died intestate in December, 1878, leaving an estate of the value of between $300,000 and $400,000, and two legitimate children, Frank R. and John S., by his second and third wives. There was no question as to the execution of the two writings set out in the pleadings, and the release of dower.

Mr. H. B. HURD, for the appellant:

As to the great caution and distrust the parol evidence of parties' relatives is to be received in cases of this kind, counsel cited *Stewart* v. *Robertson*, 2 L. R. (2 Scotch and Divorce App.) 494; *Roxburgh* v. *Watson*, 7 McPher. 21; *Floyd* v. *Calvert*, 53 Miss. 37; *Marshall* v. *Peck*, 91 Ill. 187.

At most the evidence shows no more than an expression of an intention on the part of Wallace, with which the parties rested content. *Mannsell* v. *White*, 4 House of Lords cases, 1039.

If the terms of the alleged contract are uncertain or ambiguous, or not made out by satisfactory proofs, a specific

performance will not be decreed. Story's Eq. Jur. secs. 764, 767, 769; *Graham* v. *Graham, Exr.* 34 Pa. 475; *Semmes* v. *Worthington*, 38 Md. 298; *Harder* v. *Harder*, 2 Sandf. Ch. 19; *McClure* v. *McClure*, 1 Pa. 374; *Johnson* v. *Hubbell*, 2 Stockt. 332; *Mundorff* v. *Kilbourne*, 4 Md. 459; *Stein* v. *North*, 3 Yeates, 324; *Sitton* v. *Shipp*, 65 Mo. 297; *Galbraith* v. *Galbraith*, 5 Kan. 402; *Walpole* v. *Orford*, 3 Ves. Jr. 420; *Smith* v. *Crandall*, 20 Md. 500; *Pigg* v. *Corder*, 12 Leigh, 69; Smith's Leading Cases in Equity, vol. 1, pt. 2, (note to *Lester* v. *Foxcraft*,) 1042; *Gould* v. *Mansfield*, 103 Mass. 408; *Purcell* v. *Miner*, 4 Wall. 517.

Nor except to subserve the ends of justice, and the court is satisfied that the application to it is fair, just and reasonable in every respect, founded on sufficient consideration, and without doubt on the proof as to any of its terms and motives. Story's Equity, sec. 769; *Semmes* v. *Worthington*, 38 Md. 298; *Gosse* v. *Jones*, 73 Ill. 508; *Alexander* v. *Hoffman*, 70 id. 114; *Beach* v. *Dyer*, 93 id. 295; *Cusey* v. *Hall*, 81 id. 160; *Bowman* v. *Cunningham*, 78 id. 48; *Ralls* v. *Ralls*, 82 id. 243.

There must be mutuality. *Sutherland* v. *Parkins*, 75 Ill. 338; *Semmes* v. *Worthington*, 38 Md. 298; *Gelston* v. *Segmund*, 27 id. 343; *Marble Co.* v. *Repley*, 10 Wall. 359; *Smith* v. *Crandall*, 20 Md. 500.

All the acts of part performance relied upon to take the case without the operation of the Statute of Frauds, must have been performed on the faith of the contract. The acts done must be of a substantial nature, and such that the party would suffer an injury amounting to a fraud by the refusal to execute the agreement. Story's Equity, sec. 762; *Semmes* v. *Worthington*, 38 Md. 298; *Sitton* v. *Shipp*, 65 Mo. 297; *Galbraith* v. *Galbraith*, 5 Kan. 402; *Gould* v. *Mansfield*, 103 Mass. 408; *Caton* v. *Caton*, L. R. 1 Ch. 137.

The contract between the deceased and Celia W. Wallace in favor of the complainant, is a bar to the relief sought.

Brief for the Appellant.

Messrs. LAWRENCE, CAMPBELL & LAWRENCE, and Messrs. LYMAN & JACKSON, also for the appellant:

Courts will not sustain even a deed based upon an adulterous intercourse carried on in the home of the wife between the husband and a female servant. Per Lord HARDWICKE, in *Priest* v. *Parrott*, 2 Ves. Sen. 160. And will not, in any case, enforce a mere parol contract based upon unlawful intercourse between the sexes. *Kyne* v. *Moore*, 1 Sim. & Stu. 62; *Matthew* v. *L——e*, 1 Madd. 300; *Beaumont* v. *Reese*, 8 Adol. & E. N. S. 485, (55 E. C. L. 483.)

To authorize a decree of specific performance there must be a valuable, as distinguished from a good or moral, consideration for the contract. *Colman* v. *Sarrell*, 1 Ves. Jr. 50; *Vasser* v. *Vasser*, 23 Miss. 382; *Peacock* v. *Monk*, 1 Mad. Ch. 413; 1 Ves. Sen. 133; *Underwood* v. *Hitchcock*, id. 280; *Minturn* v. *Seymour*, 4 Johns. Ch. 500; *Bland* v. *Cord*, 2 H. & G. 100; *Wadhams* v. *Gay*, 73 Ill. 415; *Hoig* v. *Adrian College*, 83 id. 267. Counsel insisted at length there was no consideration here.

If part of the consideration be illegal or immoral, a specific performance will be refused. *Featherstone* v. *Hutchinson*, Cro. Eliz. 199; *Waite* v. *Jones*, 1 Bing. (N. C.) 662; *Shackell* v. *Rosier*, 2 id. 646; *Howden* v. *Haigh*, 11 A. & E. 1036; *Barton* v. *Port Jackson Plank Road Co.* 17 Barb. 597; *Roby* v. *West*, 4 N. H. 285; *Carleton* v. *Nitcher*, 5 id. 196; *Carleton* v. *Woods*, 8 Foster, 296; *Collins* v. *Murell*, 2 Metc. (Ky.) 584; *Baldwin* v. *Palmer*, 6 Seld. 232; *Pettit* v. *Pettit*, 32 Ala. 288; *Rose* v. *Truax*, 21 Barb. 361; *Filson* v. *Harris*, 5 Barr, 452; *Crawford* v. *Morrell*, 8 Johns. 196; *Chandler* v. *Johnson*, 39 Ga. 85.

Statute of Frauds—part performance. 1 Story's Equity, sec. 762, citing *Caton* v. *Caton*, L. R. 1 Ch. App. 127; *Phillips* v. *Thompson*, 1 Johns. Ch. 131; *Semmes* v. *Worthington*, 38 Md. 298; *Frame* v. *Dawson*, 14 Ves. 387.

Mr. Wallace's agreement with Mrs. Celia W. Wallace was valid. *Jones et ux.* v. *Martin*, 3 Aust. 882; *Logan* v. *Weinholt*, 7 Bligh, 53; *Johnson* v. *Hubbell*, 10 N. J. Eq. 335; *Izard* v. *Izard*, 1 Dessan, 116; *Wright* v. *Linsley*, 30 Mo. 40; *Gupton* v. *Gupton*, 47 id. 396; *Van Dyne* v. *Vreeland*, 11 N. J. Eq. 370; *Sutton* v. *Hayden*, 62 Mo. 101; *Davison* v. *Davison*, 13 N. J. Eq. 251; *Ridley* v. *Ridley*, 11 Jur. N. S. 475; *Parsell* v. *Stryker*, 41 N. Y. 485; *Laffers* v. *Shaw*, 3 Giff. 602.

Messrs. ELDREDGE & TOURTELLOTTE, also for the appellant, after discussing the evidence at considerable length, and its insufficiency, and making various points against the right to the relief sought, referred to the following authorities in general: *Graham* v. *Graham*, 34 Pa. St. 475; *Semmes* v. *Worthington*, 38 Md. 298; *Stein* v. *North*, 3 Yeates, 324; *Sitton* v. *Shipp*, 65 Mo. 297; *Galbraith* v. *Galbraith*, 5 Kan. 40; *Pigg* v. *Corder*, 12 Leigh, 69; *Purcell* v. *Miner*, 4 Wall. 517; *Andreas* v. *Andreas*, 28 Ala. 43; *Perkins* v. *Wright*, 3 Harr. & J. 324; *Caton* v. *Caton*, L. R. 1 Ch. 137; *Gosse* v. *Jones*, 73 Ill. 508; *Beach* v. *Dyer*, 93 id. 295; *Casey* v. *Hall*, 81 id. 160; *Mercer* v. *Stark*, 1 Miss. 451; Story's Eq. Jur. secs. 751, 764, 770.

Mr. W. C. GOUDY, for the appellees, made the following among various other points:

A contract between the father of an illegitimate child with the mother for its support, education and right of inheritance, based on the consideration that the father is liable for the maintenance of the child and for damages, and the promise of the mother to surrender the custody of the child to the father, is a valid contract. *Dalton* v. *State*, 6 Blackf. 401; *Allen* v. *Davison*, 16 Ind. 417; *Hook* v. *Pratt*, 78 N. Y. 376; *Bunn* v. *Winthrop*, 1 Johns. Ch. 337; *Ridley* v. *Ridley*, 11 Jur. N. S. 475.

That the consideration of the contract is good: 1 Parsons on Contracts, 427; Chitty on Contracts, 734; *Travinger* v.

McBurney, 5 Cow. 253; *Gray* v. *Mathias*, 5 Ves. 286; *Hall* v. *Palmer*, 3 Hare, 532; *Jennings* v. *Brown*, 9 Mees. & Wels. 495; *Binnington* v. *Wallis*, 4 Barn. & Ald. 650; *Allen* v. *State*, 4 Blackf. 125; *Abshire* v. *Mather*, 27 Ind. 282; *Thompson* v. *Nelson*, 28 id. 433; *Coleman* v. *Frum*, 3 Scam. 378; *Wright* v. *Bennett*, 2 Gilm. 590.

The agreement for the custody of the child is valid, and it is a consideration, even if by parol, or by unsealed writing. *Dumain* v. *Gwynne*, 10 Allen, 270; *Curtis* v. *Curtis*, 5 Gray, 535; *Van Dyne* v. *Vreeland*, 11 N. J. Eq. 370; *Sutton* v. *Hayden*, 62 Miss. 101; *In re Mitchell*, R. M. Charl. 496; *In re Murphy*, 12 How. Pr. 513; Hurd's Habeas Corpus, 540.

A man may bind himself to dispose of his estate in a particular way, and it will be enforced against his heirs after his death. *Leeders* v. *Anstry*, 4 Ves. 501; *Laffers* v. *Maw*, 3 Giff. 592; *Prole* v. *Soady*, 2 id. 1; *Hammersby* v. *De Biel*, 12 Cl. & F. 45; L. R. 19 Eq. 174; L. R. 15 Eq. 121; 10 N. J. 335; 3 Sandf. Ch. 306; 41 N. Y. 485; 30 Mo. 396; 47 id. 40.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The inquiries arising are, whether there is satisfactory proof of the making of the alleged contract set out in the cross-bill; if so, whether a court of equity will decree its specific performance, or what is equivalent thereto; and if this be found, whether the agreement in writing of John S. Wallace, made April 10, 1872, is not a bar to any relief as against the appellant.

The proof shows clearly enough that there was an arrangement between Wallace and Jane Slover whereby he was to take the child and support it, and bring it up in his family, and treat it as his legitimate child. But was there in addition a contract touching the right of inheritance,—that the child should be an heir of Wallace, and receive such share of the real and personal property as he might be possessed of at the time of his death, as if she had been the lawful child

of himself and wife? The only evidence to sustain this alleged contract is that of Jane Slover herself, now Mrs. Matthews, and Jacob Van Auken, the uncle of Mrs. Rappleye, and all resting in parol. We are cautioned by the authorities to view testimony of the character of that here introduced, with jealousy, and to scrutinize it closely. The language of Lord NEAVES in *Roxburgh* v. *Watson*, 7 McPher. 21, (quoted by Lord CAIRNS in *Stewart* v. *Robertson*, 2 L. R. 2 Scotch and Divorce App. 494,) speaking of the testimony of near relations, is: "It is incumbent upon the court to look upon such evidence with great jealousy, and to weigh it in the most scrupulous manner, to see what is the character and position of the witnesses generally, and whether they are corroborated to such an extent as to secure confidence that they are telling the truth. Nothing would be easier than for a vicious and designing woman to fasten a marriage on a man by the evidence of her own relations and associates, and this more particularly when the man was dead, and his representatives are necessarily at a great disadvantage in disproving the alleged fact, and detecting the imposture." In *Graham* v. *Graham*, 34 Pa. St. 475, where there was a similar alleged contract, and attempted to be sustained by the mother and uncle of the complainant, in deciding the case against the claimant Judge STRONG uses the following language: "Such claims are always dangerous, and when they rest on parol evidence they should be strictly scanned, especially when an attempt is made, under cover of a parol contract, to effect a distribution different from that which the law makes, or that which the decedent has directed by his will, should it meet with no favor in a court of law. Even if any such contract may be enforced, it can only be when it is clearly proved, by direct and positive testimony, and when its terms are definite and certain. The danger attendant upon the assertion of such claims requires * * * that a tight rein should be held over them," etc. The most strin-

gent doctrines of the court should be applied in such cases. *Mundorff* v. *Kilbourn*, 4 Md. 464.

The deposition of Jane Slover, now Mrs. Matthews, was taken in the case at Joliet, in this State, March 27, 1880. She testifies that she went to Kansas from Valparaiso, and had resided in Kansas twelve years; that "before the birth of the child, and before I went to Chicago, I made an agreement with Mr. Wallace in regard to the child. He agreed to take the child, and adopt it as his own child, and care for it and educate it, and it should be his heir. That was the agreement. I agreed, under those circumstances, to give it up to them." She states that on inquiry of Mr. Wallace why he had done as he had, he said he wanted an heir. This is all her testimony substantially as to the making of the alleged contract. It came out upon her cross-examination that there was an affidavit or paper in relation to the matter, which she had before signed and sworn to; that she read this on the morning of her examination, and that she read it on the day before two or three times. In reply to the question what made her read that affidavit so many times, her answer was, "because I was so forgetful." She stated that she made the affidavit at Ft. Scott; that about three months before, Mr. Rappleye came to see her at Ft. Scott; that he was there three days, and had an interview with her on each of the days, and says, "can not tell you the day of the month that I first heard that affidavit read; think it was the second or third day after Mr. Rappleye came to my house. He had it with him when he came from Chicago. Understood from him he brought it from Chicago for me to sign and swear to it. Signed it just as it was written. What was in it was nothing more than what I have told you,—just the same. It is what Mr. Wallace promised to do."

Mr. Rappleye, however, testifies as to this: "I procured a paper, with the signature of Mrs. Matthews, in Fort Scott. I did not obtain from her more than one paper. It was

in my own handwriting. I asked the questions, and she answered them. It was prepared after I had a conversation with her. It was fore part of November, 1879."

If Mrs. Matthews' statement as to this paper writing be true, it excites suspicion whether the testimony she gives may not, to a greater or less extent, be drawn from the writing, rather than from her own memory. If the affidavit or paper writing was not gotten up in the way Mrs. Matthews' statement indicates, and she is mistaken in what she understood from Rappleye, this would be in impeachment of her memory. If her recollection is at fault with respect to an occurrence of only four or five months previous, can we have confidence that she is able to remember the particular language of a conversation had thirty-five years before? It appears, from the testimony of Mrs. Matthews, that after leaving the child in Chicago she had never spoken to it since, or had any communication whatever with the child, until meeting with Mrs. Rappleye at the taking of the deposition; that she had never since had communication with Mr. Wallace about the child, and that she did not know that she had any conversation with anybody about the child after she left it in Chicago, except with Mr. Van Auken, at the time when he came to take her away from Chicago. She states that when she discovered the fact of her pregnancy, "I felt very bad about it," and that said promise of Mr. Wallace in relation to the child being his heir, was made at the time of the first interview with him after such discovery, and that the same promise was subsequently repeated at different times.

Mr. Van Auken, the uncle of Mrs. Rappleye, at whose house in Joliet Mrs. Matthews came to have her deposition taken, and where Mr. and Mrs. Rappleye met her at that time, testifies as to a statement made to him by Wallace some time after the child was taken into the family of the latter. It is proper to note the manner in which the testimony of this witness as to an agreement that "the child

should be the heir" of Wallace, is brought out. He is first asked if Wallace made any statement in regard to any agreement he had made with Jane Slover touching the child, and if so, what he said. The witness answered that Wallace came to see him at his house in Joliet, and said he had heard witness was going to commence suit against him, and that he had made an arrangement with Jane, and did not want witness to do anything about it; that he and his wife had been after the child; "they were going to adopt it and bring it up as their own, and no one would know anything about it except a few that were living at Valparaiso, and he said that he wanted it for an heir to his property; he had no other heir but her, and he wanted the child—he wanted it as heir to his property." After then being asked what Wallace said Jane agreed to do, and answering that Wallace said that Jane had agreed to let him have the child, the witness is asked: "Now, what did he (Wallace) say that he had agreed to do?" Witness answered: "He said he had agreed to take the child and bring it up as his own,—to educate it and treat it as his own child, and he wanted it as heir to his property; that is the only heir that he had; that his wife had no children, and she probably never would have." But all this failing to come up to a contract that the child should be the heir of Wallace, witness is then asked: "Do I understand you to say that he had agreed with Jane that the child should be his heir?" and he answers, "Yes, sir, and Jane told me so." Words thus put into the mouth of a witness are less satisfactory, as declarative of the truth, than would have been his unprompted utterance. The particular agreement thus suggested is subsequently repeated by the witness. He was eighty years old, and testifying to a conversation had thirty-five years before. The foregoing is substantially all the testimony of this witness as to the alleged contract.

The testimony of Skinner, the clerk of Wallace at Valparaiso, and an intimate friend, is introduced, of statements of

Wallace, but it shows nothing of the alleged contract to make the child an heir. He testifies to conversations with Wallace near the time the child was born, and afterward, in regard to the child, and the testimony is no more than that Wallace said that the child should never want for anything; that he would take it as his own and adopt it; that if the child lived, the time would be when it would be worth more than all the Slovers, and that his wife was satisfied with the arrangement that the child should be there as his and her child.

The paper writing of February 27, 1877, given by Wallace to Mrs. Rappleye, comes short of showing the alleged contract. So, as before observed, the evidence for the establishment of the alleged contract to make the child an heir, or give to it any property, rests solely upon the testimony of the mother and uncle, and it is detailed above, substantially. Considering the relationship of these witnesses, the manner in which their testimony is educed, the improbability, from the lapse of time of thirty-five years, the subject meanwhile not having been called to the attention, of being able to testify with a reliable degree of accuracy as to the use, in a conversation occurring so long before, of particular phrases which are relied on here for establishing a case, such as "it should be made an heir," or "he would make it an heir," and the rule with respect to all verbal admissions that the evidence as to them, being the mere repetition of oral statements, ought to be received with great caution, it must be allowed that the testimony of these witnesses should be received with distrust as to the particular form of expression testified to. Aside from what these witnesses testify, the acts and declarations of Wallace do not favor his having made the particular contract which the cross-bill alleges, that he would make the child his heir. In his several conversations had with his intimate friend, Skinner, about the time the child was born, and after, in which he seemed to have expressed himself

freely in regard to what he was going to do for the child, there is no hint of such a contract.

It appears that on the 3d day of February, 1865, within three months of the marriage of Mrs. Rappleye, Wallace conveyed a piece of property in Chicago to a trustee for her benefit, the deed reciting that he was "desirous of providing reasonably for his beloved daughter." This property the trustee subsequently, at the request of the *cestui que trust* and Wallace, conveyed to one Derby, and he conveyed it to Wallace, and on the same day Wallace made a conveyance of a lot in Chicago to the former trustee for the benefit of Mrs. Rappleye, the deed containing the same recital as the former one. Subsequently, on September 14, 1865, he conveyed to Mrs. Rappleye another lot in Chicago, upon Wabash avenue, with a residence upon it. This would seem to be rather an indication of a moral feeling on the part of Wallace that he should make a reasonable provision for Mrs. Rappleye, and that what he did was a discharge of what he should do in the way of making a reasonable provision for her. The property conveyed seems to have been of the value of about $12,000. It is said that similar arrangements were made for the other children, and the provisions for all were nearly equal. We discover nothing in the record as showing provision for other children except a deed from one Andrews to Sarah M. Wallace, the second wife of Wallace, of property in Chicago, of date May 14, 1858, and a quitclaim deed of his interest in the property from Wallace to Frank R. Wallace, dated April 28, 1874, and a deed from Wallace to a trustee, of property in Chicago, in consideration of marriage about to be consummated with Celia Whipple, the third wife, in trust for Celia Whipple for life, remainder to any children of her by Wallace. These deeds at least contain no such recital as to providing reasonably for the children as does that for the benefit of Mrs. Rappleye.

The paper writing of February 27, 1877, given by Wallace to Mrs. Rappleye, would seem to have been framed as much in the interest of Mrs. Rappleye as the facts would allow, and that contains no trace of the alleged contract. The writing was drawn by a lawyer who testifies in the case, and to the conversation Wallace had with him at the time upon the subject, in which there is no statement of any such contract as is alleged. What Wallace said to the witness was, that he had agreed to adopt the child, and had adopted her. The written instrument which Wallace executed to Celia W. Wallace, April 10, 1872, does not accord with there being such a contract in existence.

It is unnatural, in the circumstances, that there should have been made a binding contract such as is alleged, understood and designed by the parties as being such, and the likelihood being that if anything was said as to the heirship of the child, it amounted at most but to words of expectation. The discovery of her condition of pregnancy alarmed and distressed the girl. The impending calamity of the exposure of her shame, and having an illegitimate child upon her hands, stood vividly before her, and at the first interview afterward had with Wallace, provision was made to meet the approaching event. It was arranged that the girl should go away to a distant city for her confinement; that Wallace should come to take the child home, and bring it up in his own family,—should adopt it. Must we not reasonably believe that this was all of the arrangement, substantially? It was at this interview Mrs. Matthews says the alleged contract was made. It was not the future of the child as to its right of inheritance which was the trouble and was to be provided for, but it was the present situation,—relief in respect of that was the pressing need, and was what was to be provided for. We can not suppose the unborn child's right of inheritance was in the thoughts of the parties, and

it is hard to believe there was intentionally a binding contract entered into securing it.

This court has said: "A court of equity should not in any case decree a specific performance, and divest the owner of land of his title, except upon clear proof." *Carver* v. *Lasater*, 36 Ill. 194, and *Gosse* v. *Jones*, 73 id. 509.

This rule as to the degree of proof in such case of a verbal contract affecting land, that it should be clear and conclusive, is familiar. In *Semmes* v. *Worthington*, 38 Md. 298, it was said, in such a case "the proof must be clear and explicit, leaving no room for reasonable doubt," and see *Purcell* v. *Miner*, 4 Wall. 517, that the complainant "should be held rigidly to full, satisfactory and indubitable proof." In *Walpole* v. *Oxford*, 3 Ves. 419, the Lord Chancellor laid it down as a general proposition that all agreements, in order to be executed in a court of equity, must be certain and defined, equal and fair, and proved in such manner as the law requires, and that it was enough to doubt in such respect to refuse relief.

We can not say that the alleged contract is established to the exclusion of a serious doubt, and with that satisfactory proof which is required by courts of equity in decreeing specific performance of contracts required by the Statute of Frauds to be in writing.

But were the existence of the contract established by satisfactory proof, specific performance will not be decreed of course. This is not a matter of right in the party, but a matter of sound discretion in the court, which withholds or grants relief according to the circumstances of each particular case. (1 Story's Eq. Jur. sec. 742; *Gosse* v. *Jones*, 73 Ill. 509.) To make a contract the basis of a decree for specific performance, it must be certain, fair and just in all its parts, and be founded upon a valuable consideration. 1 Story's Eq. Jur. sec. 769.

The only significance of a contract to make one an heir is in securing a right to property. But what is the amount of the property involved in such a contract? How much intestate estate will be left to be inherited? Such a contract existing, suppose Wallace in his lifetime had given away his property, or made a will of it all to his two lawful children or to others, would that have consisted with the right under the contract? And if not, how much of his property might he have given or devised away, and how much must he have retained to satisfy the contract? The contract would be uncertain as to the amount of property reached by it. This is a circumstance to be considered in the exercise of the discretion of the court as to decreeing specific execution.

As respects consideration so far as the unlawful cohabitation might have entered into it, that would not support the contract. An agreement in consideration of future illicit cohabitation between the parties is void, and *past* cohabitation does not form an adequate consideration for a promise not under seal. Chitty on Contracts, 734; 1 Story's Eq. Jur. sec. 296.

Although agreements under seal which import a consideration have been sustained in such cases of *past* cohabitation, yet in *Priest* v. *Parrott*, 2 Ves. Sr. 160, in a case of adulterous intercourse, such as here, there was refusal to sustain even such an agreement under seal. An unlawful intercourse had taken place there between a married man and a servant in his own family, and he had given her a deed to secure an annuity, and Lord HARDWICKE refused to recognize its validity. In his opinion given, after adverting to instances where such agreements had been sustained, he observes: "But I know no case where the court has given countenance to these sort of bonds in a case of a married man, she (the woman involved) knowing it. That differs the case, because persons who submit to a temptation of that sort are without

excuse; they know absolutely they are doing a wrong which can not be recovered or healed, and which occasions mischief to families. * * * Had she not known that he was married, or if the wife was at a distance, or if any imposition was proved on her, it would be a different thing; but nothing of that appears in this case. She entered into the family knowing it, and continued so as to occasion a separation; and this court ought to endeavor to preserve virtue in families." In the case of *Kyne* v. *Moore*, 1 Sim. & St. 61, Vice-Chancellor LEACH upheld such a bond where it made provision for the children of the adulterous intercourse as well as for the woman, and in this respect of children, distinguished the case from that of *Priest* v. *Parrott*, and criticised the ground of the distinction in the latter case as to a married man.

Which of the two cases, so far as they differ, lays down the better rule in the case of an agreement under seal, it is not necessary to determine for the purpose of the present case, which is one of a verbal promise, as all the authorities agree that a verbal promise will not be enforced when given for illicit cohabitation.

There must have been a valuable, as distinct from a good or moral, consideration for the contract to entitle it to be specifically executed. In *Vasser* v. *Vasser*, 23 Miss. 382, the court say: "To render a contract for the purchase and sale of property (such as the agreement under examination) obligatory, it is essential that there should be a consideration of value paid to the party against whom it is to be enforced. A consideration founded upon blood, or natural love and affection, will not be sufficient." And see 1 Story's Eq. Jur. sec. 7936.

A promise for the support of the child would be sustained because of the legal liability for such support. But Wallace himself rendered the support, and satisfied his whole legal

liability upon that score. The promise to make the child an heir was something over and beyond support. There was no legal liability to make it an heir, or moral obligation, so that there was no such legal liability, or even moral obligation, to support that promise.

We see nothing in the case which can plausibly be claimed as being in the way of a valuable consideration, more than the giving up the child to Wallace. Was this, under the circumstances, a valuable consideration? To make it such, it must have been something of benefit to Wallace, or of detriment to the mother. But instead of being beneficial to Wallace, the taking into his own family and bringing up of the child must have been to him a great inconvenience. To Jane Slover, in her situation, it would seem to have been rather a favor than otherwise—that she actually received a benefit, rather than suffered a detriment, from Wallace taking upon himself the care and support of the child. Is not this the proper judgment to be passed upon this transaction, viewed in the respect of constituting a valuable consideration as basis for specific performance? We do not think there is that in the case which should be recognized in a court of chancery as a sufficiently valuable consideration, within the requirement of its rule in such respect.

The suggestion is made that there was a legal liability to a bastardy prosecution for the support of the child, and to an action for damages,—that there was a settlement and release of such liability, and that this made a sufficient consideration. It is sufficient to say that nothing of this kind appears in the record. There is no evidence whatever respecting any such settlement or release, or that such liability was in the minds of the parties at all. Whatever of legal liability there was in the matter, remained subject to be enforced after the contract as well as before. The contract would have been no bar.

We are of opinion, too, there has not been the part performance here which is required in order to take an oral contract out of the operation of the Statute of Frauds. The contract being verbal, it is void by the Statute of Frauds, and a court of equity interferes to enforce such a contract only where there have been such acts of performance by the party asking relief that he would suffer an injury amounting to a fraud by the refusal to execute the agreement. In *Caton* v. *Caton*, 1 Law Rep. 1 Ch. App. 137, Lord CRANWORTH, speaking of parol contracts for sale of land, observed that the right to relief in such cases rests not merely on the contract, but on what has been done in pursuance of the contract, and to prevent a fraud. In *Setton* v. *Shipp*, 65 Mo. 297, the court say: "Courts of equity, when called on to decree a specific performance of an alleged parol agreement, are asked to exercise an extraordinary jurisdiction. They must be well satisfied of the existence and character of the agreement, and will always look to the substantial justice of the case. They must be satisfied that any resistance to the completion of the agreement alleged and proved would operate as a fraud on the other party." In *Frame* v. *Dawson*, 14 Ves. 387, speaking of such acts of performance, the Master of the Rolls said, the acts done must be such "that the party would suffer an injury amounting to a fraud by the refusal to execute the agreement." And see *Phillips* v. *Thompson*, 1 Johns. Ch. 148; 1 Story's Eq. Jur. sec. 761.

There is another rule in this connection, that the acts done should clearly appear to have been done solely with a view to the particular agreement sought to be enforced, and upon the faith of such agreement. The rule upon the subject is expressed in Story's Eq. Jur. sec. 762, as follows: "In order to make the acts such as a court of equity will deem part performance of an agreement within the statute, it is essential that they should clearly appear to be done solely with a view to the agreement being performed; for if they are acts

which might have been done with other views, they will not take the case out of the statute, since they can not properly be said to be done by way of performance of the agreement." Chancellor KENT says, in *Phillips* v. *Thompson*, 1 Johns. Ch. 131: "It is well settled that if a party sets up part performance to take a parol contract out of the statute, he must show acts unequivocally referring to and resulting from that agreement,—such as the party would not have done unless on account of that very agreement, and with a direct view to its performance; and the agreement set up must appear to be the same with the one partly performed. There must be no equivocation or uncertainty in the case." So, also, in *Semmes* v. *Worthington*, 38 Md. 298, the court say: "The act relied on as part performance must in itself furnish evidence of the identity of the contract; and it is not enough that it is evidence of some agreement, but it must relate to and be unequivocal evidence of the particular agreement charged in the bill."

Now, what thing to the injury of Jane Slover or Mrs. Rappleye has been done upon the faith of an agreement to make the child an heir of Wallace, whereby it would work a fraud on either of them to refuse to carry out such agreement? Mrs. Rappleye herself certainly has done nothing on the faith of such an agreement, as she avers in her cross-bill that she did not know of it until after the death of Wallace. As to Jane Slover, all the performance on her part is, that she let Wallace have the child. This, as we have already remarked, may, in the circumstances, be reasonably deemed as beneficial to herself, Jane Slover,—that she let Wallace have the child because she did not wish the care and support of it, and not because Wallace had made the particular contract that the child should be his heir. We can hardly think anything was done on the faith of that particular agreement.

Can it, then, be asserted that from the leaving the child in the custody of Wallace, Jane Slover would suffer an injury

amounting to a fraud by refusal to execute the agreement to make the child an heir? What was done by Jane Slover does not, as the authorities require, unequivocally refer to the agreement to make the child an heir, and was not, we think, such as she would not have done unless because of such agreement. All that was done by her may be referred to, and finds full explanation in, the agreement of Wallace to take the child, to bring it up in his own family, to adopt it. The whole manifest purpose of the transaction was for the relief of Jane Slover, and for the transfer of the care and support of the child from herself to Wallace, and it can not reasonably be supposed that any promise as to heirship of the child had the least appreciable weight in influencing the conduct of Jane Slover. What she did we may reasonably regard was in view of other promises by Wallace, which have all been fulfilled.

We do not think the acts shown here are such as a court of equity will deem a sufficient part performance of the alleged agreement, to exclude the operation of the Statute of Frauds. In this regard, as well as in other essential respects, the views we express are quite in harmony with the decision in the recent case of *Anderson* v. *Madison*, in the English Court of Appeal, 43 L. T. Rep. N. S. 334, and reported in 25 Albany Law Jour. 264.

There is in this respect of part performance and consideration a marked distinction between the case at bar and the three cases relied upon as the principal authorities on behalf of appellees, viz: *Van Dyke* v. *Vreeland*, 13 N. J. Eq. 371, *Sutton* v. *Hayden*, 62 Mo. 101, and *Allen* v. *Davison*, 16 Ind. 417. In the two former cases the promises were to the complainants themselves, and were to the effect that if they would live with the defendant in the one case, and the decedent in the other, the latter promised to leave all their property at their death to the complainants, and in consideration of the promises, and in reliance upon them, the com-

plainants lived with and performed many years of very valuable services and labor for the defendant and the decedent. The similarity in principle of these cases with the present would seem to be only in the respect of the character of the promise, and of indefiniteness and uncertainty as to the amount of property the contract would carry. In the Missouri case the defendant was the owner of a house and lot when the complainant came to live with the decedent, and to have this house and lot conveyed to the complainant was all the relief which was asked for under the contract. In the New Jersey case the bill was filed in the lifetime of the defendant, alleging he had made a fraudulent conveyance of his property for the purpose of defeating the agreement, asking that the fraudulent conveyance be set aside, and that the real estate conveyed (a certain farm) be held to secure the benefit of the agreement. The decision was upon a demurrer to the bill, where all the allegations of the bill were admitted, and the demurrer was overruled, and the complainant held to be entitled to some relief. Those cases were unlike the present not only in the respect of the agreements having been made with the complainants themselves, and the complainants having rendered many years of valuable services on the faith of the agreements, but the promises made, although general in their terms, to leave all the promisors' property at their death to the complainants, yet the promises, as sought to be enforced, respected but a single specific piece of property, a house and lot in the one case, and a farm in the other case, thus being entirely definite as asked to be enforced; and the particular pieces of property were both owned by the promisors at the time the promises were made, and so were in the contemplation of the parties as the subjects of the promises. In the proper exercise of the sound discretion of the court in decreeing specific execution, upon consideration of all the circumstances of each particular case, a decree of specific performance might well have been granted

in these two cases cited as to the property there involved, and be refused in the present case with respect to an estate acquired subsequently to the making of the promise, and of a magnitude thirty-fold greater than the whole property owned by the promisor at the time of the promise, and which could not reasonably have then been contemplated by the parties as the subject of the promise.

In the case of *Allen* v. *Davison*, the father of an illegitimate child, Davison contracted with one Simon Phillips, the father of the woman who gave birth to the child, that if Phillips would keep the child until it should be fourteen years old, Davison would convey to the child a certain piece of land. The agreement was in writing. Phillips kept the child for fourteen years, as he had agreed. The court enforced specific performance of the agreement for conveyance. Phillips had performed his part of the contract in furnishing the support of the child, which Davison, as father, was responsible for, and Phillips was entitled to compensation according to the contract,—a quite plain case for specific performance.

A contract, to be specifically executed, must be fair, just and reasonable. One kind of unfairness which stays the interference of the court, arises where the enforcement of the contract would be injurious to third persons. (Fry on Specific Perform. sec. 245.) The enforcement of such contracts as this would be productive of injustice to others—to the wife and lawful children. Had Wallace died in the situation he was at the time of the making of the alleged contract, to-wit, without lawful children, his wife, under our law, would have succeeded to one-half of his real estate, and all his personal property. But with this contract held valid, the illegitimate child would have taken the whole property, leaving to the wife only her dower right in it, and under the contract, if good, the two lawful children, as the case now is, take only one-third each, instead of one-half, which they would take without the contract. Now, is not the violation of the mar-

riage bed wrong enough to the lawful wife? Can the putative father and his participant in such conjugal offence, by arrangement between themselves, thus deprive the injured wife and her lawful children of their rights of inheritance, and bestow them in whole or in part upon the spurious offspring of their adulterous intercourse? And is a court of chancery to interpose and lend its assistance for the carrying out of such a purpose? To be sure, as the event has turned out, the wife herself will not now be affected in her right of succession, but she was liable to have been, and the lawful children are affected in their right of inheritance in the manner named. It is said there were no rights of inheritance existing at the time the contract was made, and hence the contract did not infringe any such rights; but the agreement to make one an heir could have no effect until the death of the party making the agreement, so that at the time the contract was to come into operation in its effect, there would be rights of inheritance in existence for it to affect. All there was of the contract in efficiency, was in its operation upon rights of inheritance when and at the time they arose.

By the common law an illegitimate child was incapable of inheriting at all. It is suggested the reason of the rule grew out of the feudal law, and was for the preservation of purity of blood in the nobility, in whom the landed property was to be kept. But Chancellor KENT, in his Commentaries, vol. 2, p. 176, quotes Mr. Selden as saying, (note c to Fortescue *de laud. leg. Ang.* Ch. 40,) "that not only the laws of England, but those of all other civil States, excluded bastards from inheritance, unless there was a subsequent legitimation." Our own statute has modified the rule of the common law to the extent of providing for legitimation by subsequent marriage, and allowing the illegitimate child to inherit from the mother, but as to inheriting as heir to the putative father the rule is otherwise untouched. The doctrine is one founded in public policy, which has in view, as we conceive, partly, at least,

the discouragement of illicit commerce between the sexes, and the fostering of marriage and the sustaining of the interests of the family created by lawful marriage. There could be no adoption of a child to give it the right of inheritance at common law. There was no statute of adoption in Indiana or this State at the time the alleged contract was made, so the agreement to adopt had no force as giving the right of inheritance. We now have a statute under which a child may be adopted, and the right of inheriting be given to it. But even under this statute, where there are husband and wife, the wife's interest, as respects herself or her children in the right of inheritance, can not be affected by any act of adoption by the husband alone of another's child than their own, giving it the right of inheritance, but there must be consent of the wife thereto. The act of adoption under the statute is one of much solemnity. There must be petition in writing for the purpose, in which the wife must join, and the adoption must be authorized by decree of court. Can we allow this statute of adoption to be frustrated by carrying into execution a mere verbal agreement of the husband alone to adopt an illegitimate child? We think not.

A similar conclusion in this respect appears to have been come to by the Supreme Court of Iowa in the case of *Shearer* v. *Weaver*, 56 Iowa, 578. It appeared there, in an action for the partition of real estate, that one John P. Weaver had taken and brought up a child named Isaac Weaver, under a contract with the father of the child that he would take and keep the child as his own child, and would make him an heir, and that he should have an equal share with the daughter of John P. Weaver in his property. An adoption paper for the adoption of the child was afterward executed, but accidentally was not recorded until after the death of John P. Weaver, when it should have been recorded before his death to make the adoption complete under the statute of Iowa; that after the death of John P. Weaver defendant

Hawthorn purchased the land in controversy from Isaac Weaver, as being an adopted son of John P. Weaver. The circuit court found that defendant Hawthorn had no right in the land, that the articles of adoption were invalid because not executed as required by law, and not sufficient to constitute Isaac Weaver an heir of John P. Weaver, and that Hawthorn was not entitled to claim as heir by virtue of the contract mentioned. The Supreme Court, in its opinion affirming the judgment, said: "In our opinion rights of inheritance can not be conferred by a parol agreement. * * * Our statute having provided specifically the means whereby one sustaining no blood relation to an intestate may inherit his property, the rights of inheritance must be acquired in that manner, and can be acquired in no other way."

Change of circumstances may be regarded in exercising the discretion as to decreeing specific performance. (1 Story's Eq. Jur. 750a; *Bank of Alexandria* v. *Lynn*, 1 Pet. 376.) At the time when the contract is alleged to have been made, Wallace had no lawful child; at the time of his death he had two lawful children. At the time of the making of the contract his whole property did not exceed $12,000; at his death it amounted to at least $350,000. What amount of property had the parties reasonably in view under such a contract, as to be given by it? Would it be an amount to be fixed with reference to the moderate property which Wallace possessed at the time the contract was entered into, or the large estate which he left? Not what is the letter of the contract, but what was reasonably in contemplation in the making of such a contract, and what may be equitably demanded under it? The provision which Wallace made for Mrs. Rappleye after her marriage, by deed of real estate, in his expressed desire to provide reasonably for her, was one in amount which equalled his entire property at the time the contract was made. This may properly be considered, and whether, in the view of a court of equity, it may not be looked upon as a

fair fulfillment of the requirement of such a contract, as answering all just expectations under it.

Eminent judges have questioned the wisdom of the assumption by the court of chancery of jurisdiction to decree the specific performance of verbal contracts declared void by the Statute of Frauds, expressing doubts whether its exercise had not been productive of more of harm than of benefit. We are hence admonished to be slow to exercise the power to carry into execution the verbal agreement of a putative father to invest his illegitimate offspring with the rights of inheritance, where the promise is not only in contravention of the Statute of Frauds, but in repugnance with the statutes of adoption and of descent.

But if a case for specific performance were made out, we are of opinion that the covenant made by Wallace to Celia W. Wallace, on April 10, 1872, should be held a bar to any relief as against this appellant. By that covenant with Mrs. Wallace, in consideration of the release by her of her dower in his estate, Wallace agreed that on his death, his and her son, the appellant, should receive the amount or portion of Wallace's estate that he was entitled to by the laws of Illinois. At the time, and ever, Wallace had only two legitimate children, the appellant and Frank R. Wallace, and it was the one-half of the estate that by the law of the State descended to appellant, and which this covenant secured to him. It is said that the estate which would descend would be only what was left after the payment and discharge of all debts and contracts against it, and so appellant, as heir, would take subject to the contract with Jane Slover to make her child an heir. But this is mistaking the position of appellant. He does not stand as a mere heir, a volunteer, but he stands in the position of a purchaser, the purchase price being Mrs. Wallace's right of dower. Her dower right was quite valuable. The divorce from Wallace being for his fault, did not affect her dower by our statute. This dower

right she parted with and released for this covenant, securing to appellant the portion of Wallace's intestate estate that he would take under the laws of Illinois. The contract with Jane Slover did not respect any property right which was to be first satisfied, leaving but the remainder to descend, but it was to constitute one an heir, to share as such in descendible property in the remainder of the estate after satisfaction of all claims against it. The covenant between Wallace and Celia W. Wallace was made with reference to heirs known to and recognized by the laws of Illinois,—lawful heirs, not contract made heirs. An heir made by contract was not known to the law. The covenant did provide that Wallace should not devise away any portion of appellant's share as heir, and it would be equally within the spirit and intent of the covenant that he should not contract it away by making another person an heir. The effect would be the same to diminish appellant's portion, whether a devisee was brought in by will, or a co-heir was brought in by contract, to share in the estate.

By the law of the State appellant takes as heir one-half of the estate of Wallace. This contract with Jane Slover, if enforced, would take away from him one-sixth and give it to Mrs. Rappleye, as a co-heir, made such by the contract. The covenant gives security and protection against this, and this is what was purchased by Mrs. Wallace by the release of her dower right. She knew nothing of this contract with Jane Slover. To affect her, or what she purchased by the contract, she must have had notice of it. She not having notice, appellant is entitled to protection against the contract, as being in the favorable position of an innocent purchaser for value, without notice. Had it not been released, the dower of Mrs. Wallace would have been taken out of the estate, and the residue only distributed. Now, the dower being released, the estate will be distributed free from dower, and in reality the dower be distributed as part of the estate, so that if the

claim of appellant be allowed, she will, in effect, get a third part of Mrs. Wallace's dower, and also, in addition, all that was given to Mrs. Wallace in exchange for her dower. This would not be equitable. Courts of equity will not decree a specific performance in a case where such a decree would be inequitable under all the circumstances. 1 Story's Eq. Jur. sec. 769.

Upon the whole case, all the circumstances considered, we are of opinion that Mrs. Rappleye has not shown herself entitled to any relief, and that her cross-bill should have been dismissed.

The decree is reversed, and the cause remanded for further proceedings in conformity with this opinion.

Decree reversed.

Mr. JUSTICE SCOTT: I do not concur in this decision.

Mr. JUSTICE MULKEY, also dissenting.

ELLA L. COWDREY *v.* SELINDA J. HITCHCOCK *et al.*

and

SELINDA J. HITCHCOCK *et al. v.* ELLA L. COWDREY.

Filed at Springfield June 19, 1882.

1. WILL—*construction of a will, by means of a decree of partition.* On a bill by a devisee under a will for a partition among the several devisees, and for a construction of the will, a decree of partition fully settling the rights of the parties under the will in conformity with its terms is a construction of the will and its various parts, as that is necessarily involved in determining such rights.

2. SAME—*renunciation by the widow—what amounts to an election.* The statute points out the mode by which a widow may renounce the provisions of a will made for her in lieu of dower, etc., and if she fails to pursue this mode within one year from the issue of letters testamentary, she is by the express terms of the statute deemed to have elected to take under the will. Her acceptance of the widow's award, however, though not entitled

thereto under the will, under the belief that she is so entitled, can not be held to be an election to take under the statute and to renounce the provisions of the will. Before any presumption of an election can arise, it is necessary to show that the party acting or acquiescing was cognizant of his rights, and then, whether the party intended an election.

3. SAME—*provision in lieu of widow's award, and homestead—construed.* A devise was as follows: "I give, devise and bequeath to my * * * wife * * * the equal one-third of all my real and personal estate in lieu of dower rights, and of all other rights, interests and claims which she might have or claim in or to my estate, or any part thereof," and a devise of the residue of the estate to other persons: *Held*, the provision so made for the widow was in lieu of any claim to her specific award under the statute, and to any estate of homestead. Under such a devise the widow can take no interest whatever in the estate, except the one-third named in the will.

4. While it is true that a homestead, under the statute is "exempt from the laws of conveyance, descent or devise," except as therein provided, yet when a testator devises certain property to his widow in lieu of dower and homestead, and she accepts the devise, she can not claim an estate of homestead, and it is not necessary that the devise should expressly show it is in lieu of homestead. It is sufficient if such intent is plainly manifested.

5. SAME—*whether rents of property before division are intestate assets.* Where an estate both real and personal is devised, one-third to the testator's widow, and one-third to his daughter, and the remaining third in fee to his executors, to pay certain legacies, and in case the last third is more than enough to discharge such legacies, such residue shall be proportionally divided among the legatees named, so that they may receive one entire third of the estate, no part of the estate can be treated as intestate. In such case the rents and profits of the one-third devised to the executors, which may have accrued before the sale of the property by them, will not pass by descent to the heir.

6. SAME—*appraisal of property to adjust a division—at what time to be made—and of the time to control the valuation.* Where a testator provides that in the division and partition of his estate his daughter shall take one-third part of the estate, both real and personal, and that she may, if she so elects, take a certain house and lot on her share, paying his estate any excess in value of the same over the one-third of the estate given her, it is proper to have all the estate appraised and valued at the same time, in a proceeding for a partition. The daughter, to whom such right of election is given, is not entitled to the house and lot at a valuation to be ascertained at any other time than that at which the entire property of the estate shall be appraised, as the purpose is that she shall take one-third of the estate as the same may be valued at the time of the division.

7. PARTITION—*apportioning solicitor's fee.* The statute that in proceedings for the partition of land the court may apportion the costs, includ-

ing reasonable solicitor's fees, among the parties to the suit, applies only to amicable suits for partition, and not to cases where the defendants have employed counsel for themselves to protect their interests.

8. CHANCERY—*when it will assume the settlement of an estate.* A court of chancery, on a bill to construe a will and make a partition of the estate devised among the several devisees, will not, after settling the rights of the parties, take the entire settlement of the estate from the probate court, when no sufficient reason therefor is shown. There may be cases when the court would be justified in so doing.

APPEAL from the Circuit Court of Cook county; the Hon. WILLIAM H. BARNUM, Judge, presiding.

Messrs. HERBERT, QUICK & MILLER, for Ella L. Cowdrey:

Under the will the executors took no estate, but only a power of sale to pay certain legacies. *Fay* v. *Fay*, 1 Cush. 93; *Peck* v. *Henderson*, 7 Yerg. 18; *Farebee* v. *Proctor*, 2 Dev. & Bat. Law, 439; *Proctor* v. *Farebee*, 1 Ired. Eq. 146; *Zebach* v. *Smith*, 3 Binn. 69; *Haskell* v. *House*, 3 Brev. 342; *Kirkland* v. *Cox*, 94 Ill. 411.

The heir is not to be disinherited without express devise or necessary implication of such an intention. 2 Jarman on Wills, (4th ed.) 540; *Attorney General* v. *Mangles*, 5 Mees. & W. 128; *Rosevelt* v. *Fulton*, 7 Cow. 79; *Jackson* v. *Schawber*, 7 id. 192; *Vankleeck* v. *Dutch*, 6 Paige, 600; *Holton* v. *White*, 3 Zab. 334; *Wilkinson* v. *Adams*, 1 V. & B. 456.

The result is that the legal title in the third to raise legacies vests in the heir. *Bradshaw* v. *Ellis*, 2 Dev. & Bat. Eq. 20; *Haskell* v. *House*, 3 Brev. 242; *Thompson* v. *Gaillard*, 3 Rich. Law, 418; *King* v. *Ferguson*, 2 N. & McC. 588; *Guyer* v. *Maynard*, 6 Gill & J. 423; *Tainter* v. *Clark*, 3 Metc. 220; *Kirkland* v. *Cox*, 94 Ill. 413; Hill on Trustees, *236 and note, *471 and note; Perry on Trusts, secs. 308, 765, 350, and cases cited above.

The rents and profits go to the heir. *Schawtz Estate*, 14 Pa. St. 47; *Guyer* v. *Maynard*, 6 Gill & J. 423; Perry on Trusts, secs. 308, 765; Hill on Trustees, *471, and cases

cited; *Kirkland* v. *Cox*, 94 Ill. 413; *Lindenberger* v. *Matlack*, 4 Wash. 278; *Hopkins* v. *Hopkins*, 1 Atk. 589; *Hopkins* v. *Hopkins*, Cas. Talb. 44; *Bullock* v. *Stones*, 2 Ves. 521; *Wills* v. *Wills*, 1 D. & War. 439; *Gore* v. *Gore*, 2 P. Wms. 28; *Nash* v. *Smith*, 17 Ves. 29; *Duffield* v. *Elwes*, 2 Sim. & S. 544, and cases cited in argument; *Duffield* v. *Duffield*, 3 Bligh, N. R. 260.

The valuation of the property should have been made at the date of the election to take the same, and not at the time of the partition. The election once made could not be withdrawn. It fixed the estate subject to valuation in the daughter. 3 Com. Dig. 614, Election C. 2; 3 Bacon's Abr. title "Election," 314; *Leonard* v. *Crommelin*, 1 Edw. Ch. 206; *Spofford* v. *Manning*, 6 Paige, 383; *Davis* v. *Davis*, 11 Ohio, 386; *Wilbanks* v. *Wilbanks*, 18 Ill. 17.

The court erred in allowing the widow to take under the will. The devise to her was sufficient to put her to an election. Leading Cases in Equity, part 1, 524, *357; *Gosling* v. *Warberton*, Cro. Eliz. 128; *Lacy* v. *Anderson*, Choice Cases in Chancery, 155; *Boynton* v. *Boynton*, 1 Bro. Ch. 445; *Dyke* v. *Rendell*, 2 DeG. M. & G. 209; *Notley* v. *Palmer*, 2 Drew, 93.

At common law, when the provisions of the will are absolutely inconsistent with her claims of dower, she must make her election. 2 Williams on Executors, *1303.

Mrs. Hitchcock can not take against, and under the will. *Lessley* v. *Lessley*, 44 Ill. 529; *Brown* v. *Pitney*, 39 id. 468; *Herbert* v. *Wren*, 7 Cranch, 330.

It is well settled that an election need not be formally made, but may be inferred from circumstances. 1 Leading Cases in Equity, 1154, 1169; *Harris* v. *Watkins*, 2 Kay & J. 47; *Hawley* v. *James*, 5 Paige, 318; *Avant* v. *Robertson*, 2 McMull. 215; *Quarles* v. *Garrett*, 4 Dessaus. 145; *Bradford* v. *Kents*, 43 Pa. St. 474; *Buist* v. *Dawes*, 3 Rich. Eq. 300; *Stark* v. *Hunton*, Saxton's Ch. 216; *Watkins* v. *Watkins*, 7

Yerg. 295; *Hapgood* v. *Houghton*, 22 Pick. 483; *Dundas* v. *Hitchcock*, 12 How. 256.

And the presumption that a person has made an election, will arise from very slight circumstances. 1 Leading Cases in Equity, 1155, citing *Pulteney* v. *Darlington*, 1 Bro. Ch. C. 238; *Van* v. *Barnet*, 19 Ves. 109; *Cookson* v. *Cookson*, 12 Cl. & F. 121; *Dixon* v. *Grayfere*, 17 Beav. 433.

An implied election may be made by acts *in pais*. It is an election when the widow takes one of the two alternatives, with knowledge of the condition of the estate and of the facts which determine her legal rights. *Butricke* v. *Broadhurst*, 1 Ves. 172; *Earl of Northampton* v. *Earl of Aylesford*, Ambl. 540; *Worthington* v. *Wiginton*, 20 Beav. 67; *Bradford* v. *Kents*, 43 Pa. St. 474; *Buist* v. *Dawes*, 3 Rich. Eq. 300; *Cauffman* v. *Cauffman*, 17 Serg. & R. 16; *Light* v. *Light*, 21 Pa. St. 412; *Stark* v. *Hunton*, Saxton's Ch. 216; *Reed* v. *Dickerman*, 12 Pick. 149; *Ambler* v. *Norton*, 4 H. & M. 23.

It is well settled that bringing a writ or action for dower, or other suit or proceeding to enforce the adverse right, is a good election by a widow to take against a will, at law as well as in equity. 3 Leon. 373; *Butler & Baker's case*, 3 Coke, 27b; Hobart, 159; 3 Com. Dig. 614, Election C. 2, citing Co. Lit. 145a b; 1 Lomax's Dig. 122, (2d ed.) 146, sec. 34; *Wilson* v. *Hamilton*, 9 Serg. & R. 424; *Hapgood* v. *Houghton*, 22 Pick. 483; *Watkins* v. *Watkins*, 7 Yerg. 283; *Quarles* v. *Garrett*, 4 Dessaus. 146; *Raynor* v. *Capehart*, 2 Hawks, 375.

An election once made is final and irrevocable. 3 Com. Dig. 614, Election C. 2; 3 Bac. Abr. title "Election," 314; *Leonard* v. *Crommelin*, 1 Edw. Ch. 206; *Wilbanks* v. *Wilbanks*, 18 Ill. 17; *Davis* v. *Davis*, 11 Ohio, 386; *Spofford* v. *Manning*, 6 Paige, 383.

There must be some property which the testator had not the power to distribute, to raise a case for compensation. *Britowe* v. *Warde*, 2 Ves. Jr. 366; *Box* v. *Barrett*, 3 L. R. Eq. 244, citing *Langslow* v. *Langslow*, 21 Beav. 552; *Blacket*

v. *Lamb*, 14 id. 482; *Banks* v. *Banks*, 17 id. 352; *In re Fowler's Tr.* 27 id. 362; Leading Cases R. P. 352, (2d ed.); 1 Leading Cases in Equity, *345, and cases cited.

In this case the estate devised to Mrs. Hitchcock, upon her election to take against the will, there being no residuary clause in the will, went as intestate estate to Mrs. Cowdrey, the testator's daughter and heir at law. Mrs. Hitchcock having elected against the will, can not claim anything under the will. So far as she is concerned, her husband may be regarded as having died intestate. *Barnett* v. *Barnett*, 1 Metc. (Ky.) 254; *Wood* v. *Wood*, id. 512; *Armstrong* v. *Park*, 9 Humph. 195; *Hoover* v. *Landis*, 76 Pa. St. 354; *Brink* v. *Layton*, 2 Redf. 79; *Sackett* v. *Mallory*, 1 Metc. (Mass.) 355; *McReynolds* v. *Jones*, 30 Ala. 101; *Allen* v. *Hannum*, 15 Kan. 627.

The court should have assumed the whole direction and settlement of said estate, as prayed for in the bill of complaint, and not attempted at arm's length, as in said decree, to do so partially. *Grattan* v. *Grattan*, 18 Ill. 171; *Lynch* v. *Rolan*, 39 id. 19; *Townsend* v. *Radcliffe*, 44 id. 448.

The court should have apportioned the solicitor's fees, as well as costs, under the present statute. The cases of *Kilgour* v. *Crawford*, 51 Ill. 249, *Stempel* v. *Thomas*, 89 id. 146, and *Stenger* v. *Edwards*, 70 id. 631, were decided under the act of 1869. The act of 1874 places solicitors' fees with the costs of the suit.

Mr. JOHN P. WILSON, for Selinda J. Hitchcock:

Mrs. Hitchcock is entitled to her widow's award in addition to the provision made for her by the will of her husband. Rev. Stat. chapter relating to "Administrations," secs. 74, 76; *Phelps* v. *Phelps*, 72 Ill. 545; *Strawn* v. *Strawn*, 53 id. 253; *York* v. *York*, 38 id. 532.

She has not lost her right of homestead by taking under the will of her husband. See Homestead act, as amended in 1873, sec. 2.

The statute placed the homestead beyond the power of the husband to dispose of by will. In determining what constitutes the estate of Dr. Hitchcock, the estate of homestead vested in Mrs. Hitchcock can not be included as part. She takes the estate not as an heir of her husband, nor as a claim against his estate, but as her own property, vested in her by the statute. *Merritt* v. *Merritt*, 97 Ill. 243; *Eldridge* v. *Pierce*, 90 id. 474.

Mrs. Hitchcock has not forfeited her right under her husband's will by accepting her widow's award. To constitute an election the act must be done with a full knowledge of the circumstances of the case and the party's rights, and then the party must have intended to make an election. 2 Story's Eq. Jur. 1097; *Wintour* v. *Clifton*, 21 Beav. 468; *Pusey* v. *Deshower*, 3 P. Wms. 315; *Wake* v. *Wake*, 1 Ves. Jr. 335; *Padburg* v. *Clarke*, 2 Moen & Gord. 298; *Spread* v. *Morgan*, 11 H. L. Cases, 258, 602, 611; *Stratford* v. *Powell*, 1 Ball & Beatty, 1; *Briscoe* v. *Briscoe*, Jan. & Lat. 334; S. C. Irish Eq. 123; *Watson* v. *Watson*, 128 Mass. 122; *Dillon* v. *Parker*, 1 Swanst. 359; 1 Jarman on Wills, 471; White & Tudor's Leading Cases in Equity, 570, 372; Williams on Executors, 1558; 4 Kent's Commentaries, 57; *Gale* v. *Gale*, 48 Ill. 471.

The rule of law is compensation and not forfeiture in case Mrs. Hitchcock shall be held to have elected to take against the will by accepting her widow's award. Story's Eq. Jur. sec. 1085; *Gretton* v. *Howard*, 1 Swanst. 409; 1 Jarman on Wills, (5th ed.) 446; *Wilbanks* v. *Wilbanks*, 18 Ill. 21; *Jennings* v. *Jennings*, 21 Ohio St. 56.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a bill brought by Ella L. Cowdrey for a partition of the estate of Horatio Hitchcock, who died testate, in Chicago, on the 10th day of January, 1880. In the bill it is alleged that complainant, Ella L. Cowdrey, is the only child of the deceased, and that Selinda J. Hitchcock, defend-

ant, is his widow, who are his only heirs. It is also alleged that deceased devised to his wife, Selinda J. Hitchcock, the equal one-third part of his real and personal estate in lieu of all dower, and all other rights and claims which she might have in his estate, giving her an election to take the dwelling house, No. 888 Prairie avenue, and the furniture therein, on account of her share. In case it exceeded her one-third she was to make up to the estate the excess; that a like one-third part of the estate was devised to complainant, with an election to take as a part of her share the lot on the corner of State street and Harmon Court, paying any excess of its value over one-third to the estate; that the testator devised the remaining third of his estate in fee to the executors, for the purpose of paying certain specific legacies, and for the distribution of the estate according to the will. After the filing of the bill the complainant filed an amendment, which in substance set up that the widow, by taking the widow's award, had forfeited her rights under the will, and had in effect renounced its provisions. In the amendment complainant prayed for a construction of the will, and for partition. On a final hearing the court decreed that the estate be equally divided between complainant, the widow, and the executors, directing the commissioners to set off to Mrs. Hitchcock 888 Prairie avenue as a portion of her third, and to complainant the State street lot, they having elected to take the same on account of their respective shares. It was also decreed that the widow was not entitled to homestead rights in the property, or to the widow's award, in addition to her rights under the will. From this decree complainant and the widow both appealed.

It is contended that the court erred in failing to place a construction upon the will. Upon an examination of the decree rendered by the court we perceive no ground to sustain this position. The rights of the different parties under the will are fully settled by the decree, and a division of the

estate is ordered in conformity to the provisions of the will, which could not have been done by the court without construing the will and its various provisions relating to the rights of the parties.

It is also contended that the court erred in decreeing that the widow was entitled to take under the will. It is not claimed that the widow ever directly renounced the provisions of the will, or announced an intention not to take under it; but the argument is, that her election to take the widow's award, which was set off to her by the appraisers of the estate, is in effect a renunciation of the will. Section 10, of chap. 41, Rev. Stat. 1874, provides that any devise of land, or estate therein, or any other provision made by the will of a deceased husband or wife for a surviving wife or husband, shall, unless otherwise expressed in the will, bar the dower of such survivor, unless the provisions of the will shall be renounced. Section 11 declares, any one entitled to an election under either of the two preceding sections shall be deemed to have elected to take such jointure, devise, or other provision, unless within one year after letters testamentary or of administration are issued, he or she shall deliver or transmit to the county court of the proper county a written renunciation of such jointure, devise, or other provision. Section 13 prescribes the form of the renunciation, and that it shall be filed and recorded in the probate court, and shall operate as a bar to any devise under the will. Here is a complete mode pointed out by the statute under which a widow may renounce the provisions of a will, and if she fails to pursue the course pointed out by the statute within one year from the date letters testamentary are issued, she is, by the express terms of the statute, deemed to have elected to take under the will. Here the year expired, and the widow filed no renunciation, and whatever may have been the rule at common law, the statute is explicit that she shall be deemed to have elected to accept the provisions of the will. The fact

that she accepted the widow's award can not, unless the plain provisions of the statute are disregarded, be held to be an election to take under the statute. It is nowhere pretended that the widow intended to reject the provisions of the will. On the other hand, it is apparent from the record that she supposed she had the right to take under the will, and at the same time accept the widow's award. Under such circumstances it would be adopting a hard rule to hold that the mere act of accepting the widow's award, under a mistaken belief, would bar her of all rights under the will, and we do not believe that any respectable authority would sustain a precedent of that character. In Story's Equity, vol. 2, sec. 1097, it is said: "Before any presumption of an election can arise, it is necessary to show that the party acting or acquiescing was cognizant of his rights. When this is ascertained it may be further necessary to consider whether the party intended an election." See, also, White & Tudor's Leading Cases in Equity, p. 570. The widow in this case, by accepting the award, as appears from the evidence, never intended to reject the provisions of the will, but all the time supposed, and was advised, that it was her right to take under the will and accept the widow's award. Under such circumstances we perceive no ground for holding that she can not take under the will.

The next question presented is, whether Mrs. Hitchcock is entitled to the widow's award in addition to the provision made for her by the will of her husband. This question depends upon the construction to be placed upon that portion of the will which devises certain property to the widow, which is as follows: "I give, devise and bequeath to my * * * wife * * * the equal one-third of all my real and personal estate in lieu of dower rights, and of all other rights, interests and claims which she might have or claim in or to my estate, or any part thereof." The testator had the right to devise his property to any person he saw proper, and upon

such lawful terms as his judgment might dictate. It is true, the widow was under no obligation to accept the provisions of the will. She could reject the provisions of the will and take under the statute, but when she elected to take under the will she could take only upon the terms imposed by the testator. What did the testator mean when he gave his wife one-third of all his real and personal estate in lieu of dower rights, and of all other rights, interest and claims which she might have or claim in or to the estate? Did he intend that she should have one-third of his estate and $3000 in addition, known as a widow's award? The testator is presumed to have known that the statute provided for a widow's award, which was a claim or interest she had in and to his estate, and doubtless with this fact in view, and wishing to give her only one-third of his estate, he imposed the terms that the bequest should be in lieu of all rights, interest or claims in or to his estate. The language of the will is broad and comprehensive, and in our judgment shows a clear intention that the widow should take no interest whatever in his estate, except the one-third named in the will.

But it is said the widow's award is conferred by the statute. So, too, is dower, and it is not denied that a bequest may be made in lieu of dower. The widow's award is a certain portion of the testator's estate, which, by the statute, is given to the widow, but at the same time the testator had the right to devise his wife certain property in lieu of that award, and if she saw proper to accept the provision of the will, she relinquished all claim to the widow's award. We think the intention of the testator was plain that his widow should have one-third, and only one-third, of his estate, and that intention should be carried out and sustained.

The premises, 888 Prairie avenue, were occupied by the deceased as a residence at the time of his death, and since that time they have been occupied by the widow, and it is claimed that in a division of the estate she ought not to be

required to account for the rents of the property, as she is entitled to an estate of homestead therein although she accepts the provision of the will. It is true that a homestead under the statute is exempt "from the laws of conveyance, descent or devise," except as therein provided, but if the testator devised certain property to his wife in lieu of dower and homestead, and she accepted the provision of the will, she can not claim a homestead in the property. It is true that in the devise to the widow the word "homestead" is not used, but the language employed by the testator is broad enough to include that estate. The devise to the widow is made "in lieu of all dower rights, and all other rights, interests and claims which she might have or claim in or to my estate, or any part thereof." The right of homestead given by the statute to the widow in the property occupied by the deceased at the time of his death, was one which would clearly fall within the term "all other rights," unless the homestead can be held to be something other than a right or interest in the testator's estate, which is unreasonable. Again, the provisions of the will are utterly inconsistent with the theory that the widow could take under the will and claim a homestead. The entire estate is to be divided into three equal parts, which could not be done if a portion of the property was to be incumbered by an estate of homestead. These are matters which may properly be considered in arriving at the intent of the testator. *Meech* v. *Meech*, 37 Vt. 414.

The court, in the decree, found that one-third of the estate was devised to the executors in fee, and we have been furnished with a labored argument to show that this is erroneous, and that complainant is entitled to the rents of the third of the estate devised to the executors as an intestate estate, until it shall be sold and converted into money. Upon an examination of the will, we think the intention of the testator is clearly expressed that his estate shall be divided into three equal parts, one-third of which is devised to his widow, one-

third to his daughter, complainant, and the remaining third to his executors, so that no part of his estate can be regarded as intestate property. In the first clause of the will the testator directs the payment of debts. The second item declares: "I give * * * to my wife * * * the equal one-third of all my real and personal estate in lieu of all dower rights, and all other rights, interests and claims which she might have or claim in or to my estate." Then follows the clause which authorizes the widow to elect certain property in her share. The second item declares: "I give, devise, etc., to my daughter, Ella Cowdrey, one other equal third part of my estate, real, personal and mixed." Then follows the devise authorizing her to select certain property as her share of the estate. The third item is as follows: "Out of the other and remaining one-third of all my real and personal estate, * * * I give and direct that my executors shall pay certain enumerated legacies. In case said remaining one-third of my estate is more than sufficient to pay the amounts in this item directed to be paid, then said amounts shall be and are proportionally increased, so that the whole of said remaining one-third shall be paid and distributed to and among the persons above in this item named as legatees." Then follows a provision authorizing the executors to sell, after partition, such real estate as shall be set apart as the remaining third part of the estate. Then follows this provision: "The said remaining one-third of my estate being devised to my executors in fee, for the purposes of carrying out the directions and objects in this item mentioned, and the just and proper division of my estate, according to the provisions of this my will, and the distribution of the moneys arising from said remaining one-third among the legatees above in this item mentioned."

From these provisions of the will there would seem to be no doubt in regard to the intention of the testator to leave no part of his estate to descend under the statute. Under the

last provision cited, the testator seemed desirous to leave no ground for doubt in regard to the one-third of his estate devised to pay legacies, and hence the emphatic language, "the said remaining one-third of my estate being devised to my executors in fee." The language here employed is so plain that there is no room for construction.

It is also claimed that the court erred in excluding evidence of the value of the property at the corner of Harmon Court and State street, at the time of filing the amended bill, December 10, 1880. This is the date complainant elected to take the property last described, and it is contended that its value at that time is to control, and not the value at the time the whole estate should be divided. The provision of the will relating to this subject is as follows: "In case my said daughter shall elect and desire to have and receive, on account of her said share, the lot and premises situated at the south-east corner of State street and Harmon Court, in said city of Chicago, belonging to me, then it is my will that she *may* receive the same, in case the same does not, on a partition or division of my estate among my devisees, exceed in value the said one-third of my estate above herein given to her, or if my said daughter shall make up and pay to my estate the excess in value of the same over said one-third of my estate given to her as aforesaid, if there be any such excess in value." It was, as we have before seen, the intention of the testator that his estate should be divided into three equal parts. Now, if complainant has the right to have that portion of the property she may select, appraised on the 10th day of December, 1880, and the balance of the estate is not appraised until there is a partition, should the property increase in value, which is not an uncommon thing, then complainant would receive a larger proportion of the estate than she is entitled to receive under the will. In order to obviate this difficulty, the entire estate should be appraised at one time, and the time, no doubt,

intended by the testator, was when a partition should be made. Again, the language of the will does not, in our judgment, leave the matter in doubt. Complainant is to have the property on the corner of State street and Harmon Court, in case it does not, on a partition of the whole estate among the devisees, exceed in value one-third, or if she shall pay over the excess in value to the estate, then she takes the property. She takes upon a partition of the whole estate, and the valuation is to be made of the entire estate at that time. This is the view taken by the circuit court, and we entertain no doubt in regard to its correctness.

It is also claimed that the court should have assumed the entire settlement of the estate. There may be cases where a court of chancery might be justified in taking the settlement of an estate from the probate court, but this is not such a case. No reason whatever has been shown which, in our judgment, should prevent the probate court from proceeding in the settlement of this estate as it would do in the settlement of any other estate.

It is also claimed that the court erred in refusing to apportion solicitor's fees. The statute provides that in all proceedings for the partition of real estate the court may apportion the costs, including reasonable solicitor's fees, among the parties to the proceeding, so that each party will pay his equitable portion thereof. We think this question was settled in *Kilgour* v. *Crawford*, 51 Ill. 249, where it is said: "Where the proceedings are amicable, and the parties do not deem it necessary to employ counsel to protect their interests, it is proper that the power given by this law should be exercised, as all the parties have the benefits of the partition; but where the defendants deem it necessary to employ counsel in order to protect their interests, and secure a just partition or an equitable assignment of dower, we can see no reason why they should be required not only to pay the fees of their own counsel, but also a part of the fees of adverse counsel." It

is true the statute has been somewhat changed since the decision cited was rendered, but the rule established is as proper under the one statute as the other.

In conclusion, we are of opinion that the decree of the circuit court is correct, and it will be affirmed.

Decree affirmed.

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103 277
144 288
103 277
51a 145

103 277
200 *186

103 277
209 *451

JOHN B. MILLER *et al.*

v.

THEODORE A. SHAW *et al.*

Filed at Ottawa June 21, 1882.

1. RECORDING LAW—*deed first recorded must prevail.* Where a deed of trust on certain real estate given to secure an indebtedness of the grantor is recorded before any other deed made by him is filed for record, a regular foreclosure of the trust deed by a sale that would bar the grantor's equity of redemption, will cut off and bar all claim of title of parties claiming under a deed from such grantor, which was recorded after the trust deed.

2. ADMISSION—*asserting title under trust deed—admission thereby.* If a party procures a conveyance of real estate from one whose title is derived from a sale of the premises under a trust deed, and asserts title thereunder, that is an admission that the foreclosure of the trust deed and the trustee's deed to the purchaser were regular and effective to pass the estate of the grantor in the trust deed.

3. DECLARATION OF TRUST—*destroyed by sale under prior deed of trust.* If there be a valid sale and conveyance of land by a trustee under a power in the deed of trust to him, such action will cut off all rights of third parties under a declaration of trust made by the grantor in the trust deed after the recording of the trust deed.

4. EVIDENCE—*recitals in trustee's deed.* Where a trustee assumes to sell land under a power in a deed of trust, the recitals in his deed are made by statute evidence of the facts so recited therein.

5. SECONDARY EVIDENCE—*abstracts of title where deeds and records are destroyed.* Where original deeds, as well as the record books in which they were recorded, have been destroyed by fire, and neither party is able to produce copies of such deeds, resort may be had to secondary evidence to prove their contents, and by the act of 1872, in relation to lost or destroyed

records of conveyances, abstracts of title made by persons engaged in abstracting titles, are made evidence in all courts of law or equity, and may be received to prove the contents of such deeds.

6. TRUSTEE'S DEED—*whether showing sale of several, or only one lot.* Where a trustee under a deed of trust conveying several lots, after a sale by him, conveys to the purchaser all such lots, and in one part of his deed recites the sale by him of one lot, this will not defeat his deed for the other lots when from the whole deed and all its recitals it sufficiently appears he made sale of all the lots conveyed.

7. LACHES—*in avoiding sale under deed of trust.* Where lots of a person were sold under a deed of trust given by him, and he acquiesced in the trustee's sale and conveyance up to the time of his death, which was more than seven years after the sale, during which time others acquired title under that sale, and no claim was set up to the property by the heirs of the grantor for more than twenty years after the sale, it was *held*, that both the grantor and those claiming under him were estopped to deny that the trustee's sale and deed were valid, and that they were barred by their *laches.*

8. So, where a trustee, under a power in a trust deed, sold and conveyed all the lots embraced in the trust deed, more than six years before the grantor's death, and the grantor knew of such sale, and that the purchaser claimed all the lots, the latter frequently applying to the grantor to raise the money with which to pay the indebtedness, or to take back the property, which he failed to do, and finally the grantor told the purchaser to keep the property and do the best he could with it, as he could not do anything more, this was *held* such an acquiescence in the sale as to estop him and those claiming under him from asserting title to the lots, and that his *laches* was a bar to any equitable relief.

9. MARRIED WOMAN—*deed of her separate property under law in 1867.* All that was required by the laws in force in 1867, to enable a married woman to convey her real estate, was that she and her husband should execute the deed, after which she should appear before a proper officer and acknowledge the same in the mode pointed out in the statute, and such deed being acknowledged by the husband, or his execution thereof proven according to law, it was effectual to pass the title to the wife's separate property.

10. In the beginning of a deed for the separate real estate of a wife, where the parties are first stated, "A B, in her own right, wife of C D," was named as party of the first part, and her husband was not otherwise named in that clause of the deed as the party making the grant, but in the clause releasing the homestead the husband was named as "party of the first part," and so in the covenanting and attesting clauses, and he also signed and acknowledged it as his and his wife's deed: *Held*, that even if the statute of 1845 required the husband to join in the granting clause, that fact was sufficiently shown by the deed, taking the whole of it together.

Brief for the Appellants.

APPEAL from the Circuit Court of Cook county; the Hon. WILLIAM H. BARNUM, Judge, presiding.

Messrs. ROSENTHAL & PENCE, for the appellants:

If a trustee or attorney in fact executes a deed, the person claiming title under such deed must produce the power or authority under which such deed was executed. *Jackson* v. *Roberts*, 11 Wend. 425; *Elliott* v. *Pearce*, 20 Ark. 508; *Tolman* v. *Emerson*, 4 Pick. 162; 2 Cowen H. & E. notes to Phillips on Evidence, p. 471, note 429; *Hinman* v. *Pope*, 1 Gilm. 131; *Bybee* v. *Ashby*, 2 id. 151; *Atkins* v. *Hinman*, 2 id. 437; *Penrose* v. *Griffith*, 4 Binn. 231; *Jackson* v. *Anderson*, 4 Wend. 482.

Recitals in a deed are no evidence of anything against parties who do not claim under such deed. *Penrose* v. *Griffith*, 4 Binn. 231.

It is not an admission that the title is in a party because the true owner takes a deed from him, or gets up such outstanding claim. *Owen* v. *Robbins*, 19 Ill. 545.

By the recitals in the trustee's deed from Strauss to Culbertson, only lot 3 was sold, while all six of the lots in question were conveyed. As to the lots not sold, the deed conveyed only the legal title, leaving the equity of redemption in Doolittle not foreclosed. *Walwork* v. *Derby*, 40 Ill. 527.

The indebtedness fell due October 5, 1857, and the same is barred, and the presumption of law is, that it has been paid, and the title is left free of all incumbrance. *Mester* v. *Hauser*, 94 Ill. 433.

The husband not joining the wife in the conveying part of the deed, it was void as to both, and conveyed no title to Ward. It was held in *Hogan* v. *Hogan*, 89 Ill. 427, that the mere consent of the husband in the same writing did not fulfill the statute. The law is, that the husband must be a grantor with the wife. *Leavitt* v. *Lamprey*, 13 Pick. 382; *Lufkin* v. *Curtis*, 13 Mass. 222; *Catlin* v. *Ware*, 9 id. 219;

Jewett v. *Davis*, 10 Allen, 70; *Bruce* v. *Wood*, 1 Metc. 542; *Warner* v. *Peck*, 11 R. I. 431; *McFarland* v. *Febiger*, 7 Ohio, 337; *Percell* v. *Goshorn*, 17 id. 123; *Kern* v. *Peeler*, 4 Jones, (N. C.) 226; *Gray* v. *Mathis*, 7 id. 502; *Hammond* v. *Thompson*, 56 Ala. 591; *Agricultural Bank* v. *Rice*, 4 How. 241; *Lawrence* v. *Heister*, 3 Harris & J. 371; *Baxter* v. *Bodkin*, 25 Ind. 172; *Cox* v. *Wells*, 7 Blackf. 410; *Hedges* v. *Ward*, 15 B. Mon. 106.

A party may claim title from several sources, and he may show that he holds the paramount title from any one of these sources. *Owen* v. *Robbins*, 19 Ill. 555; *McClurken* v. *McClurken*, 46 id. 230; *Blight* v. *Rochester*, 7 Wheat. 535; *Osterhout* v. *Shoemaker*, 3 Hill, 513; *Watkins* v. *Holman*, 16 Pet. 54; Bigelow on Estoppel, 251, note 3, pp. 260, 335.

Messrs. GRANT, SWIFT & BRADY, for the appellees:

Appellants are barred by the gross neglect and *laches* of their ancestor and their own. *Hamilton* v. *Lubukee*, 51 Ill. 415; *Munn* v. *Burges*, 70 id. 604; *Dempster* v. *West*, 69 id. 613; *Winchell* v. *Edwards*, 57 id. 45; *Walsh* v. *Brennan*, 52 id. 193.

That there was a power of sale in the trust deed sufficiently appears from the abstract of title and the recitals in the trustee's deed. *Graham* v. *Anderson*, 42 Ill. 515; *Weld* v. *Rees*, 48 id. 437; *Strother* v. *Law*, 54 id. 413; *Burr* v. *Borden*, 61 id. 389.

It is claimed that the trustee's deed to Strauss shows that only one out of the six lots thereby conveyed was sold by the trustee. Taking the whole deed together, no such inference can be drawn. In construing deeds, etc., the entire instrument, including its recitals and covenants, must be taken together, and the intention thus gathered must prevail. *Walker* v. *Douglass*, 70 Ill. 445; *Peckham* v. *Paddock*, 36 id. 38; *Swift* v. *Lee*, 65 id. 336; *Alton* v. *Illinois Transportation Co.* 12 id. 38.

Briefs for the Appellees.

Messrs. SCHUYLER & FOLLANSBEE, also for the appellees:

The proof tends to show that the trust deed to Scoville contained a power of sale. If, either through the proof offered, it appears there was a power of sale, or a presumption, even, is raised of that fact, no matter how defectively the same was executed, the appellees, as remote *bona fide* purchasers, will be protected, and it therefore becomes unnecessary to show anything beyond the mere fact that such a power existed. *Gunnell* v. *Cockerill*, 79 Ill. 79; *Hoag* v. *Gibbons*, 95 id. 45; *Wilson* v. *South Park Comrs.* 70 id. 46; *McNary* v. *Southworth*, 58 id. 473; *Hamilton* v. *Lubukee*, 51 id. 415; *McHaney* v. *Schenk*, 88 id. 357; *Bush* v. *Sherman*, 80 id. 160; *Munn* v. *Burges*, 70 id. 604; *Kellogg* v. *Wilson*, 89 id. 357; *Farrar* v. *Payne*, 73 id. 82; *Pratt* v. *Stone*, 80 id. 440; *Mulvey* v. *Gibbons*, 87 id. 367; *Jenkins, Assignee*, v. *Pierce et al.* 98 id. 646.

A. J. Miller, and those claiming under him, are estopped from questioning the validity of the foreclosure of either trust deed, by standing by for years seeing another hold himself out as owner under such foreclosure, and deal with it as his own, and allow the property to change hands for valuable considerations. *Cochran* v. *Harrow*, 22 Ill. 345; *Jenkins* v. *Pierce et al.* 98 id. 646.

Mr. EDMUND S. HOLBROOK, also for the appellees:

Even admitting defects of conveyances affecting appellees' title, it is sufficient to reply the *laches* of appellants, and the fact that appellees are *bona fide* purchasers without notice. *Higgins* v. *Curtiss*, 28 Ill. 28; *Cox* v. *Montgomery*, 36 id. 398; *Hamilton* v. *Lubukee*, 51 id. 415; *Winchell* v. *Edmunds*, 57 id. 46; *Burr et al.* v. *Borden et al.* 61 id. 390; *Conover* v. *Musgrave*, 68 id. 58; *Wilson* v. *South Park Comrs.* 70 id. 46; *Munn* v. *Burges*, id. 606; *Farrar* v. *Payne et al.* 73 id. 82; *Gunnell* v. *Cockerill*, 79 id. 79; *Bush* v. *Sherman*, 86 id. 160; *Heinander* v. *Drake*, 81 id. 34; *McNab* v. *Young*, id. 12;

Kœster v. *Burke*, id. 439; *Williams* v. *Rhodes*, id. 571; *Gunnell et al.* v. *Cockerill*, 84 id. 319; *Fairman* v. *Peck*, 87 id. 156; *Mulvey* v. *Gibbons et al.* id. 367; *McHaney* v. *Schenk*, 88 id. 357; *Kellogg* v. *Wilson*, 89 id. 357; *Gibbons* v. *Hoag*, 95 id. 47; *Jenkins, Assignee*, v. *Pierce et al.* 98 id. 646.

These conveyances by the trustee are not void, for the sale by the trustee, however wrongful, or whether he performs or not, transfers the legal title. *Reese* v. *Allen, Admr.* 5 Gilm. 236, and notes; *Anderson* v. *Graham*, 42 Ill. 514; *Dawson* v. *Hayden et al.* 67 id. 52; *Kœster* v. *Burke*, 81 id. 439.

MR. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

The original petition in this case was filed by Louis A. Doolittle, since deceased, in the circuit court of Cook county, under the act of 1872, commonly known as the "Burnt Records act," and was to confirm in him the title to lots described in the petition. To his petition, which was filed on the 1st day of June, 1874, a number of persons claiming to be the owners of the property, or at least claiming an interest in it, were made parties. Some of these defendants answered, and filed cross-petitions, in which they ask to have the title to the lots described, or some of them, confirmed in them. Afterwards, September 4, 1877, the parties prosecuting the present appeal, and who describe themselves as heirs at law of Andrew J. Miller, deceased, filed a cross-petition, in which they asked to have confirmed in them the title to all the lots in controversy. Issues were joined on the answers to the original and cross-petitions, and on the hearing the court found the title to one lot to be in Shaw, Honore and Heywood, the title to another to be in Dale, and the title to all of the other lots to be in Grubb, who had succeeded to the title that was in John L. Reynolds in his lifetime. The Miller heirs bring the case to this court on appeal. Since the original petition was filed Louis A. Doolittle has died, and the interest that he claimed in the property is not now

pressed on the attention of the court in behalf of his representatives. Excepting lot 18, Doolittle never claimed more than to hold the legal title to the other lots in trust for the heirs of Andrew J. Miller. The real contest is between the heirs of Miller and the other defendants claiming the paramount title to the property.

It may be remarked in the outset that the claim to the property put forth by the parties prosecuting this appeal has few, if any, equitable considerations in its support. The property was pledged by their ancestor for the payment of borrowed money. There is no pretense the indebtedness for which it was pledged was ever paid, other than by the conveyance of the property itself to the creditor by the trustee of the debtor. It passed to the creditor at its full value at the time, and has since been claimed by such creditor and his grantees, who have since paid all taxes and assessments upon it, as *bona fide* owners would do. More than twenty years have elapsed since the trustee conveyed the property to the creditor of Andrew J. Miller, on default being made in the payment of his indebtedness. Now it is said, the indebtedness secured is barred by the Statute of Limitations, and as there are some defects or want of adequate power in the execution of the deeds of trust that secured such indebtedness, or in the execution of other deeds in the chain of title, the heirs of the deceased debtor, as counsel are understood to present their claim, ask to have the title to the property confirmed in them, free from any incumbrance placed on it by their ancestor, notwithstanding so much delay has intervened before the assertion of any title by them, and that the property has since become very valuable, and passed into the hands of *bona fide* holders for very large considerations.

The common source of title claimed by the respective parties is John C. Miller, who had a deed to all the lots from Francis A. Hoffman. The claimants in this appeal insist upon title to the property from three distinct sources: First,

through John C. Miller, in whom it is conceded the title was, and who conveyed it to Andrew J. Miller, and from him, through *mesne* conveyances, the title to the property is said to have come to George N. Williams, who conveyed it to them; second, through Louis A. Doolittle, by a declaration of trust; and third, from L. Martha Sheldon, by deed of conveyance directly to them. On the other hand, defendants in this appeal deraign title to the property through a trust deed from John C. Miller to Scoville, which was executed and recorded prior to John C. Miller's deed to Andrew J. Miller; second, under Scoville, through a trustee's deed, from Strauss; and third, under Strauss, through a prior deed from L. Martha Sheldon.

It is apparent the trust deed from John C. Miller to Scoville being oldest in point of time, and first on record before any other deed made by him, if that trust deed was so foreclosed as to cut off the equity of redemption that remained in him before his conveyance to Andrew J. Miller, it would bar all claim of the present claimants to the property through their father to George N. Williams, and from Williams to them, and also all claim from their father, save what they might take, if anything, through the declaration of trust in their favor by Louis A. Doolittle. Whatever title, if any, claimants obtained under the deed from L. Martha Sheldon, it was by purchase of the property, and not as heirs of Andrew J. Miller. Claiming under the latter deed is an admission the foreclosure of the trust deeds to Scoville and Strauss were regular, and were effective to pass the equitable estate of their ancestor in the property. Two questions are then presented: First, whether claimants take any interest in the property as heirs at law of Andrew J. Miller; and second, whether they obtained any title by their purchase from L. Martha Sheldon. Of course, if the title passed under the deed from Strauss to Culbertson, the subsequent declaration of trust by Doolittle, the grantor in the trust deed to

Strauss, that he held the legal title for the Miller heirs, is a matter of no consequence, and that branch of the case will not be further remarked upon.

It will be necessary to state the facts a little more fully in order to a clear understanding of the objection taken to the deed of Scoville to Greenebaum, which is the real source of the title claimed by the defendants in this appeal, and upon which much stress is laid in the argument on behalf of the parties challenging its validity. The trust deed made by John C. Miller and wife to George Scoville, bears date October 17, 1856, and was given to secure a note made by Andrew J. Miller, payable to his own order, nine months after date, at the office of Swift, Ransom & Co., in New York, for the sum of $3000, with interest after due, at ten per cent per annum. It was recorded on the 18th day of October, in the same year. This deed covers the property in controversy, and as has been seen, is the first in defendants' chain of title. Default was made in the payment of the note, and on the application of the holder, Scoville advertised the property and sold it to Henry Greenebaum for $3100, and made him a deed for it, bearing date August 5, 1857, and which was duly recorded in the proper office. The originals of these deeds were both destroyed by fire in October, 1871, so that neither party is able to produce the originals, or a copy of either deed. It was necessary therefore to resort to secondary evidence to ascertain their contents, and under the act of 1872 in relation to lost or destroyed records of conveyances, abstracts of title made by persons engaged in that business are admissible in evidence in all courts of law or equity. The objection taken to the deed from Scoville to Greenebaum is, that the trust deed from Miller to Scoville contained no power of sale authorizing the trustee to make a sale of the property that would cut off the grantor's equity of redemption. This, it is thought, is a misapprehension of the evidence. The recitals in the deed from Scoville to Greenebaum are quite fully set

forth in the abstract introduced, and which is made evidence of the facts it contains, by the statute. It is recited that John C. Miller and his wife executed to Scoville, as trustee, a trust deed on the property, to secure the note of Andrew J. Miller, and in default of payment application was made by Swift, Ransom & Co., the legal holders, to Scoville, to sell the premises for the purposes in such deed expressed, and that in pursuance of such application a sale of the premises had been made by Scoville, after the same had been advertised in a public newspaper, and that at such sale Henry Greenebaum bid off each lot at a certain price, and in consideration thereof Scoville, as such trustee, conveyed the lots to the purchaser. There is some parol evidence tending to show the trust deed to Scoville did in fact contain the usual power of sale, but that may be disregarded as not entirely satisfactory. Regarding only the evidence found in the abstract of title, it seems impossible for any one to read it without being satisfied the Scoville trust deed did contain the usual power of sale. The recitals it is shown the deed contained make that impression on the mind, and no reasoning, however subtle or confidently asserted, can remove that impression. It is inconceivable that any one having any business sense would make application to the trustee to sell the trust property to pay his debt, when the trust deed conferred no power on the trustee to make such sale, and it is still more unreasonable to believe any trustee would assume to make such a sale under a deed, presumably in his possession, that gave him no authority to act in the premises. The acts of these parties must have a reasonable construction, and especially when considered a quarter of a century after they transpired, when the evidence of what they did can at best be only imperfectly produced. It certainly ought to be understood these parties acted with the same common sense possessed by business men transacting such matters. Unless the Scoville trust deed contained the usual power of sale that

would enable him to sell the property as he did, as the attorney of the grantor, to pay the note secured, the acts of all parties concerned are meaningless and senseless. But construing the trust deed as containing a power of sale, then the conduct of the parties is consistent and intelligible, and conforms to the conduct of sensible business men in such matters. Why did the holders of the note make application to the trustee to sell the premises, for the purposes in the deed expressed, if the deed contained no such authority? Or why did the trustee advertise the property for sale in a public newspaper, unless it was in conformity with the provisions of the trust deed authorizing a sale to be made? Giving to these acts of the trustee and the holders of the note, and other parties concerned, that reasonable construction that would ordinarily be placed on the conduct of business men, it seems impossible to resist the conclusion forced upon the mind by the proof introduced, that the trust deed contained a power of sale. Any other conclusion would be most unreasonable, and could only be reached by placing the most absurd construction upon the conduct of men that must be presumed to have had ordinary business sense. It follows that under the Scoville deed the property passed absolutely to Henry Greenebaum, and hence the equity of redemption that had been in John C. Miller, and all persons claiming under him, was forever barred.

Passing to the consideration of another branch of the case, it appears that on the same day he obtained the deed from Scoville, Henry Greenebaum conveyed the property to Louis A. Doolittle, and Doolittle, on the same day, conveyed it by deed of trust to Samuel Strauss, to secure the note of Andrew J. Miller, bearing the same date, and payable to Elias Greenebaum, sixty days after date, for $3100, with ten per cent interest, which trust deed contained a warrant of attorney authorizing a sale of the property for the payment of the note in case it was not paid at maturity. It is apparent the

transaction was by the consent of all the parties interested, and was for the personal benefit of Miller, that he might secure that which was equivalent to an extension of his former loan. Default was made by Andrew J. Miller in the payment of this second note, and on the application of the holder the trustee (Strauss) advertised the property for sale, and at the sale Culbertson, who had become the holder and owner of the note, bid in the property, and received a trustee's deed from Strauss conveying all the lots to him. An objection to the sufficiency of the deed from Strauss to Culbertson is insisted upon, but if it shall be ascertained that deed is effectual to pass the title to Culbertson, it must be conceded that *mesne* conveyances from him placed the absolute title in fee simple to the property in L. Martha Sheldon.

The original deed from Strauss to Culbertson is in evidence, and there can be no misunderstanding as to what it contains. The defect pointed out to the deed is, that although all the lots in controversy were conveyed by the trustee to Culbertson, the recitals show that only the "first tract," viz: lot 3, was bid off by him. The objection is hypercritical in the extreme. Parol evidence given shows that all the lots were in fact bid off by Culbertson at the trustee's sale; but all such evidence may be rejected, and still it sufficiently appears, when all the recitals of the deed are considered together, as they should be, that all of the lots were sold to Culbertson. It is idle to talk about the deed having any other meaning consistent with the common understanding of the language used in the deed to express what was done.

But the decision, so far as the appealing claimants insist upon title from their father, Andrew J. Miller, may be placed on another ground. His claim, whatever it may have been, was barred by what the law calls *laches*, before his death, and certainly his heirs will not be permitted to assert a claim barred in the lifetime of their ancestor. It will be remembered the deed from Scoville to Greenebaum was made in

August, 1857, more than twenty years before these claimants filed their cross-petition asking the court to confirm the title to the property in them. It will also be remembered that Andrew J. Miller did not die until September 2, 1864, which was more than seven years after the date of the deed of Scoville to Greenebaum. It can not be denied that Andrew J. Miller acquiesced in the making of that deed, for it was, as has been seen, made for his benefit, and, under the circumstances, presumably with his consent and others interested, and since others have acquired title in good faith under it he will be estopped to deny it was a valid deed.

As respects the deed from Strauss to Culbertson, it was made April 30, 1858, which was more than six years before the death of Andrew J. Miller. He knew of the sale of the property to Culbertson, and that he claimed all the lots under his deed from Strauss. He was frequently applied to by the purchaser to raise the money with which to pay his indebtedness, and take back the property. This he failed to do, and finally he told Culbertson he would have to take the property and do the best he could with it, as he could do nothing more. It would be most improbable to suppose the parties were talking about the "first tract," lot *three*. No doubt is entertained that they were talking concerning all the lots embraced in the deed, the ownership of which Miller well knew Culbertson was claiming under the trustee's deed to him. What Miller did was an acquiescence in the sale and an abandonment of the property. It does not appear he ever afterwards set up any claim to any of the lots. The doctrine of *laches*, as applicable to the facts of this case, is stated by this court in *Sherman* v. *Bush*, 80 Ill. 160, where it is said: "Unreasonable delay, not explained by equitable circumstances, has always been declared evidence of acquiescence in the sale, and a waiver of all mere irregularities. A party will not be permitted to delay to enable him to speculate on the chances of an appreciation in values of the

property, and elect to avoid the sale only when it will be profitable to do so. He must make his election at the earliest practicable moment." The case cited has many features in common with the one being considered, as respects the *laches* of the party claiming to be the equitable owner of the property. Default had been made in this case, as in that, in the conditions of the trust deed, and all that remained to the ancestor of the appealing claimants, under the most favorable construction, was the equity of redemption, of which he might have availed had the alleged defects existed in the sales made by his trustees. Relief in no view could be had except in a court of chancery, and upon terms that should be just to all parties. At the trustee's sale the property brought its full value, and the evidence shows most conclusively no great speculation could have been anticipated, shortly after the latter sale, by a redemption of the property. If what was done by Miller and others interested could be treated as a redemption of the property from the sale made by Scoville, the evidence is full to the point Miller expressly refused to make any further effort to redeem the property from the sale made by Strauss, but in fact abandoned it to his creditor. Since then the property has increased many times in value, and the heirs of the alleged equitable owner deem it desirable now the sales and conveyances may be avoided, and as the indebtedness secured has long since been barred by the Statute of Limitations, that they may have the title to the property confirmed in them free from all incumbrances. This accords with no sense of right and justice. Applying to the facts of the case the doctrine of *laches*, as may be done, it is plain the ancestor of claimants, at the time of his death in 1864, could not have asserted any claim to the property, and certainly his heirs will not be permitted to assert a claim that he could not do.

It has been seen that whatever title Culbertson had in the property, passed to L. Martha Sheldon by a regular chain of

conveyances, and assuming, as is warranted by both the law and the evidence, the title in her was unassailable, either by the former equitable owner, if now living, or by his heirs since his death, the remaining questions to be considered are, whether that title passed to defendants in this appeal by her deed of February 8, 1867, or to the present claimants by her deed of June 22, 1877. This latter deed was made since the original petition in this cause was filed, and was for the nominal consideration of fifty dollars. It is a quitclaim deed, and contains no covenants.

Mrs. Sheldon, at the time of the making of the deed of February 8, 1867, to Ward, under which defendants deraign title, was a married woman, living with her husband, Seth Sheldon, Jr., and the defect said to exist in the deed is that her husband did not join with her in the granting clause of the deed so as to pass the title to her separate property, as this was. The statute then in force in relation to conveyances of real estate by a married woman, provided when any husband and wife residing in this State shall wish to convey the real estate of the wife, it shall and may be lawful for the husband and the wife, she being above the age of eighteen years, to execute any grant, bargain, sale, lease, re-lease, feoffment, deed, conveyance or assurance in law whatsoever for the conveying of such lands, tenements and hereditaments; and if, after the executing thereof, such wife shall appear before some judge, or other officer authorized to take acknowledgments of such instruments, and acknowledge the same, after having been made acquainted with its contents by such officer, and such deed being acknowledged or proved according to law as to the husband, shall be as effectual in law as if executed by such woman while sole and unmarried. That which this statute requires to be done to enable the wife to convey her separate property is, that she and her husband shall execute the deed, and after that she shall appear before a proper officer and acknowledge the same in

the mode pointed out in the statute, and such deed being acknowledged or proved according to law by the husband, it will be as effectual to pass the title to the wife's separate property as the deed of an unmarried woman would be to convey her property. All this was done in this case. Both Mrs. Sheldon and her husband, Seth Sheldon, executed the deed to Ward, and afterwards she appeared before a proper officer and acknowledged it in conformity with the statute, and the acknowledgment of her husband to the deed being according to law, that seems to be all the law requires to be done to make the deed effectual to pass the title to the wife's separate estate.

But if more is required, and it shall be held the statute is imperative the husband shall join with the wife in the granting clause of the deed, it may be said, when the whole deed is read together, it sufficiently appears he also joined with her in the granting clause of this deed. It is true that in the beginning of the deed, where the parties to it are first stated, it is said, "L. Martha Sheldon, in her own right, wife of Seth Sheldon, Jr.," is the party of the first part, and her husband is not otherwise named in that clause of the deed as the party making the grant, but in the clause of the deed releasing the homestead the husband is named as being "party of the first part," and so also in the covenanting clause of the deed he is again named as "party of the first part," and the same is true as to the attestation clause of the deed. It will be noticed that in the covenanting clause of the deed, where the husband is mentioned as "party of the first part" with the wife, such party (that is, the husband and wife,) warrant that at the time of the making of the deed they were well "seized of the premises above conveyed"—that is, by the granting clause of the deed—"as of a good, sure, perfect, absolute and indefeasible estate of inheritance, in law and in fee simple, and have good right, full power and lawful authority to grant, bargain, sell and convey the same, in manner and form

aforesaid." Who is it that is seized of the premises above "conveyed," and has "lawful authority to sell and convey, in manner and form as aforesaid?" It is and can be no other than the "party of the first part," the grantors in the deed, of which the husband and wife both say the husband is one. It is three times repeated the husband is a party of the "first part" mentioned in the deed, and to hold by construction he is not a party of the "first part" who are grantors in the deed, is to disregard what the husband and wife have both covenanted he is. It is obvious to any one reading the whole deed together, the husband executed the deed with his wife as grantor to pass the title to the wife's separate property, and the deed being acknowledged in conformity with the statute, it was effectual in law to pass the title to the grantee. As the deed of Mrs. Sheldon and her husband to Ward is the prior one in date and of record, and as that title passed by *mesne* conveyance to defendants in this appeal, it follows their title is paramount, and must prevail over the second deed from her to the other claimants.

The decree of the circuit court will be affirmed.

Decree affirmed.

THE ST. LOUIS AND IRON MOUNTAIN RAILROAD COMPANY

v.

RUSSEL M. LARNED.

108 293
141 114
40a 474

108 293
160 652
49a 571

108 293
178 523

Filed at Ottawa June 21, 1882.

1. CARRIER—*liability beyond its own line of conveyance.* While it is true that a railroad carrier may by contract restrict its liability to its own line, there is no doubt that it may also extend its liability beyond its own line.

2. So, where a railroad company in its own wrong shipped a lot of cotton from its depot in Arkansas, to Waterville, in the State of Maine, beyond the terminus of its road, and on the application of the agent purchasing the cotton, gave him a bill of lading containing a printed stipulation restricting its

Syllabus.

liability to its own line of road, naming the number of bales, and containing this entry, written in a blank: "To be forwarded from Waterville, Maine, (where the cotton is now lying) at consignee's expense. All charges for transportation to that point, and necessary charges, to be paid by him,"—and the oral evidence showed it was to be transported to Putnam, Connecticut, it was *held*, that the company was liable to the assignee of the bill of lading, the consignee, for the value of the cotton, on account of its non-delivery at Putnam.

3. SAME—*which of two carriers liable.* An agent for eastern parties bought cotton in Arkansas, which he left at the defendant's railroad depot, taking receipts for the same, but gave no orders for its shipment, and the railroad company, without any authority from such agent, shipped the same to Waterville, Maine, where another company—the Maine Central Railroad Company—delivered the same to a person who was not in fact entitled to it. On learning the facts the defendant railroad gave a bill of lading, agreeing to transport the cotton to the person who was entitled to it, in Connecticut, at the consignee's cost and expense, which was not done, the person receiving the cotton refusing to give it up, claiming it was bought for him. The agent drew a draft on his principal, to which he attached the bill of lading, properly assigned, which was paid by the principal, and the latter brought suit against the defendant railroad for the value of the cotton, and recovered. It was contended that the consignee should have sued the Maine Central railroad, and not the defendant: *Held*, that while he might have waived the defendant's contract, and have sued the other company for a conversion, or the person receiving the cotton, he was under no obligation to do so, and that the recovery against the defendant was warranted.

4. SAME—*estoppel to assert facts that would defeat transfer of property by an assignment of a bill of lading.* While it may be that property in the adverse possession of another is not transferable so as to pass the title, yet where a railroad company gives a bill of lading reciting that the property is then lying in a depot at a certain place, and agrees to forward the same to the consignee, and others advance money on the faith of such bill of lading, which is assigned by the shipper, the railroad company will be estopped, as against such persons, from showing that at the time of giving such bill of lading, and its indorsement, the goods were in the adverse possession of another person, so as to defeat an action brought by the consignee so advancing money on the bill of lading.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. SIDNEY SMITH, Judge, presiding.

Mr. CHARLES H. WOOD, for the appellant.

Mr. E. C. LARNED, and Mr. A. M. PENCE, for the appellee.

Opinion of the Court.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears that one G. T. Potter, in the years 1879 and 1880, was engaged in Arkansas in the purchase of cotton for Lockwood & Co., of Waterville, in Maine, and appellee, of Providence, Rhode Island, and other eastern manufacturers. They furnished him money, and he purchased the cotton and delivered it to appellant, at its depot in Texarkana, when receipts or tickets were given to him as each separate lot was delivered. When he wished to make a shipment he returned the tickets, and a bill of lading was given him. He thereupon drew on the consignee for the value of the cotton thus shipped, and attached the bill of lading and obtained the money on the draft. In this manner he raised money to pay for the cotton he purchased. Having cotton in the depot for which he held tickets, the freight agent by mistake shipped fifty bales to Waterville, which were intended to be shipped to Larned, at Providence. When Potter came to ship it to Larned he heard of the mistake, but being informed that it was still at Waterville, it was agreed that the railroad company would have it reshipped to Putnam, Connecticut. Thereupon the railroad company gave Potter a through bill of lading, using an ordinary printed blank, with all of the terms and conditions, but writing in the undertaking to so deliver it. This bill of lading was assigned to Larned, attached to a draft drawn on him and sent forward, and the draft was paid. The railroad company failed to make delivery. Larned was informed the cotton was at Waterville, but on inquiry it was found that the last carrier, the Maine Central Railroad Company, had delivered it to Lockwood & Co. On demand they refused to deliver it to Larned, and he sued appellant for a failure to deliver according to the terms of its bill of lading. A trial was had in the Superior Court of Cook county, resulting in a verdict and judgment in favor of plaintiff. The case was removed to the Appellate Court,

the judgment was affirmed, and defendant appeals to this court.

It is urged that railroads may, by express contract, limit their liability to loss on their own road, and against loss occurring beyond the terminus of their own line, and that the bill of lading in this case contained a restriction of that kind. Admitting this bill of lading does contain such a stipulation, after naming the number of bales of cotton shipped, it contains this: "To be forwarded from Waterville, Maine, (where the cotton is now lying) at consignee's expense. All charges for transportation to that point, and necessary charges, also to be paid by him." This was written in a blank in the bill of lading. While it is true that a railroad carrier may restrict its liability to its own line, it can not be denied that it may extend its liability beyond its own line. It in this case did in terms agree to forward the cotton from Waterville, and the oral evidence shows it was to Putnam, Connecticut. The company thereby undertook to transport this cotton from Waterville to Putnam. It is no answer to say the cotton was not there. It had been put in their depot and custody to be held for shipment, and they, of their own wrong, and without authority or orders from the holders of their receipts, had sent it to Waterville, and they were bound to return it to Potter, at Texarkana, or respond in damages, had he demanded it. But he waived that right, and agreed that they might deliver it at Putnam, and this they undertook to do by this contract, and the company was bound to perform the undertaking.

It is urged that the suit should have been against the Maine Central Railroad Company. If an action would lie against it for a wrong delivery, it is in favor of appellant. Potter did not place the cotton in its possession, nor did he authorize or direct it to be done. It was placed in its possession by appellant, of its own wrong. Then why require Potter or his assignee to sue that company? It may be that

he might, if he chose, have waived the contract of appellant, and sued that company for a conversion of the property, but he was under no obligation to do so. The same is true as to suing Lockwood & Co., as neither he nor his assignee placed the cotton in their hands.

It is claimed that the assignment of the bill of lading did not transfer the title, because it was in the adverse possession of Lockwood & Co., who claimed to own it at the time the assignment was indorsed. Concede this to be true under ordinary circumstances, appellant is estopped to deny that the cotton was at Waterville. The company say in its bill of lading that the cotton is lying at that place, and the bank who received the bill of lading with the assignment, and advanced the money on it, we may presume, would not have done so had it known this statement was untrue, and the cotton was in the possession of an adverse claimant, and could only be recovered at the end of a law suit. It was by this statement of appellant that each successive assignee was induced to advance money on it, and it would be a fraud on them to permit appellant to escape liability by showing that this statement on which they acted was untrue. It presents a clear case requiring the application of an estoppel. It is in the fullest sense an estoppel upon appellant.

It is insisted that the damages were assessed too high. If it were conceded that the finding and assessment of damages is not the finding of a fact which has been found the same way by the Appellate Court, and we can look into the evidence to determine the correctness of the finding, the evidence clearly sustains it. This being true, there is no force in this position.

Perceiving no error in this record, the judgment of the Appellate Court must be affirmed.

Judgment affirmed.

Syllabus.

THE VILLAGE OF WARREN

v.

JOHN W. WRIGHT.

103 298
35a 422
103 258
72a 581

Filed at Ottawa June 21, 1882.

1. EVIDENCE—*in action for injury from defective sidewalk—evidence in rebuttal, as to previous physical condition of the plaintiff.* In an action against a village to recover damages for injuries from the falling of a sidewalk, the plaintiff claiming that he received an injury in his back, the defendant introduced evidence of a previous complaint on his part of weakness in the back. In answer to this, witnesses on the part of the plaintiff were allowed to testify to their not having heard any complaint by him in regard to his back previous to the accident: *Held*, that though of a negative character, and entitled to but little, if any, weight, it was not irrelevant.

2. SAME—*as explanatory of plaintiff continuing a journey after he was injured.* A party, after receiving a personal injury from a defective sidewalk in this State, went to Canada, where his deposition was taken in a suit by him to recover damages. In the cross-examination he was asked if he stopped over at any place on his return to Canada, and answered that he did not, and then said in explanation that a physician on the train advised him not to stop off over night, but to get home as soon as he could: *Held*, that in rebuttal of the inference as to his physical condition, which might be drawn from the fact of his being able to go through to Canada without any stopping, it was proper for him to give his reason for not stopping over.

3. SAME—*as to physical condition of plaintiff a year before receiving a personal injury.* Where a plaintiff left Canada to go to the village of Warren, in this State, in March, 1876, and there received a personal injury in May, 1877, by the falling of a sidewalk, in a suit by him against the village, evidence on the part of the plaintiff as to his good physical condition when he left Canada was objected to as too remote: *Held*, that as there was testimony on the part of the defendant as to the poor health of the plaintiff but a short time after his coming to Warren, the objection was without force.

4. ERROR WILL NOT ALWAYS REVERSE—*as to admission of evidence.* On the trial of an action to recover for an injury from a defective sidewalk, the court admitted on the part of the plaintiff evidence of the rebuilding of the walk, the manner in which it was built, and that it was different from the mode of the original construction: *Held*, that while this evidence should not have been received, yet as there was much testimony that the sidewalk had come to be in a manifestly defective and unsafe condition, the reception of such evidence was not a fatal error.

5. In the same proceeding it was error to admit evidence on the part of the plaintiff that he was a married man, and had a family; but the defendant

Brief for the Appellant.

having proved the same fact, and the plaintiff's counsel afterwards having withdrawn such evidence from the jury, the error was regarded as a harmless one, though there might be a question whether the withdrawal of the plaintiff's evidence on this point would have cured the error.

6. INSTRUCTION—*giving facts of one side only.* An instruction which sets forth at length the facts as testified to by the party's own witnesses, and upon the hypothesis of the belief of such facts directs the jury how to find, is objectionable, and is properly refused.

7. SAME—*stating facts as constituting due care.* An instruction is faulty which details certain facts as constituting ordinary care and diligence, instead of leaving it to the jury to determine, from all the evidence in the case, whether there had been the exercise of due care and diligence by the party charged with negligence.

8. SAME—*construed—as whether assuming a controverted question of fact.* In an action against an incorporated village to recover for a personal injury alleged to have resulted from a defective sidewalk, the defendant asked an instruction to the effect that if the sidewalk was constructed by adjacent lot owners then there would be required of the corporation only a certain measure of diligence. The court modified this instruction by saying, "that where a corporation *authorizes* the lot owner to construct the sidewalk, it is the duty of the corporation," etc. The modification was held not to be obnoxious to the criticism that it *assumed* that the corporation authorized and directed the construction of the sidewalk, or that it was done under its supervision, when that was a contested point in the case whether the sidewalk was thus constructed, or was built entirely by the lot owner. The word "authorize" imported no more than the corporation *allowing* the lot owner to construct the sidewalk, as he might well have done under the village ordinance.

APPEAL from the Appellate Court for the Second District; —heard in that court on appeal from the Circuit Court of Jo Daviess county; the Hon. JOHN V. EUSTACE, Judge, presiding.

Messrs. LUKE & JONES, for the appellant, among other objections to the evidence, presented the following:

The admission of evidence that the plaintiff was a married man, and had a family, was error, and without palliation or excuse. See this case, 5 Bradw. 433; *City of Chicago* v. *O'Brennan*, 65 Ill. 163; *Pittsburg, Ft. Wayne and Chicago R. R. Co.* v. *Powers*, 74 id. 343; *Chicago and Northwestern R. R. Co.* v. *Moranda*, 93 id. 303.

The error in the admission of this evidence was not cured by its subsequent withdrawal several days after it was given. *Lafayette, Bloomington and Mississippi R. R. Co.* v. *Winslow et al.* 66 Ill. 223; *Lycoming Fire Ins. Co.* v. *Rubin*, 79 Ill. 408.

Messrs. D. & T. J. SHEEAN, for the appellee:

Sidewalks being a part of the street, it is the duty of an incorporated city or village having control of the streets to keep the sidewalks thereon in repair and in a safe condition, and the corporation will be liable in damages to any one injured from a neglect to discharge this duty. *City of Bloomington* v. *Bay*, 42 Ill. 503; *City of Joliet* v. *Varley*, 35 id. 58; *City of Chicago* v. *Herz*, 87 id. 541.

The fact that the city authorities impose the duty of constructing sidewalks upon the lot owners, will not relieve the city from liability in case a sidewalk, no matter by whom constructed, is suffered to be and remain out of repair. *City of Bloomington* v. *Bay*, 42 Ill. 507; Cooley on Torts, 625.

After a reasonable time has expired for city authorities, by the use of due diligence, to learn of defects in the streets or sidewalks, and they are not repaired, the city will be guilty of such negligence as to render it liable for any injury produced thereby. *Schmidt* v. *Chicago and Northwestern Ry. Co.* 83 Ill. 406; *City of Rockford* v. *Hildebrand*, 61 id. 156; *City of Springfield* v. *Doyle*, 76 id. 202.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action, brought against the village of Warren, to recover for an injury sustained from the falling of a sidewalk, on May 11, 1877, upon which plaintiff was standing at the time. There was a recovery for $2000. On appeal to the Appellate Court for the Second District the judgment was affirmed, and an appeal taken by the village to this court.

The errors assigned are in the respect of the admission of testimony, and of instructions.

Plaintiff claimed that he received injury in his back. There was evidence on the part of defendant of complaint by plaintiff of weakness in the back previous to the accident. In answer to this, witnesses on the part of plaintiff were allowed to testify to their not having heard any complaint by him in regard to his back previously to the accident in question, and exception is taken to this. We can not say that this testimony was wholly irrelevant, although, being of a negative character, it might be entitled to little, if any, weight. If the circumstances were such that complaint would be likely to have been made had there been such ailment, then the testimony would have been worthy of consideration.

The plaintiff came from Canada to Warren, in the spring of 1876, and some time after the occurrence of the accident returned to Canada. His deposition was taken in the case. In a cross-interrogatory on the part of defendant he was asked if he stopped over at any place in returning from Warren to Canada, and answered that he did not, and then said in explanation that a physician on the train advised him not to stop off over night, but to get home as soon as he could, and the admission of this evidence is complained of. In rebuttal of the inference as to the physical condition of the plaintiff which might be drawn from the fact of his being able to go through from Warren to Canada without any stopping, we think it was proper for him to give the reason for his not stopping over. We find no force in the objection that the evidence on the part of the plaintiff as to his good physical condition at the time he left Canada, in March, 1876, to go to Warren, was too remote, the happening of the accident not being until on May 11, 1877, as there was testimony on defendant's part as to the poor health of plaintiff but a short time after his coming to Warren.

Objection is made to the admission of evidence of the rebuilding of the sidewalk after its fall, the manner in which it was rebuilt, and that it was different from the mode of the original construction. This testimony could only have been relevant as founding an inference that the sidewalk was defectively constructed originally, and that there was a want of ordinary care in that respect. We think it was inadmissible for that purpose. The fact of the falling of the sidewalk might well have suggested a different mode of construction to guard against the possibility of a like occurrence, when there might have been originally no culpable negligence in not foreseeing such a disaster, and in the mode of original construction. From other causes, too, a different and improved mode of construction might have been adopted, and while we think the evidence should not have been received, yet there was so much testimony in the case that the sidewalk had come to be in a manifestly defective and unsafe condition, we do not think the reception of this evidence should be held to be a fatal error.

Evidence was admitted and excepted to that plaintiff was a married man, and had a family. It was error to admit this evidence. *City of Chicago* v. *O'Brennan*, 65 Ill. 163; *Pittsburg, Ft. Wayne and Chicago R. R. Co.* v. *Powers*, 74 id. 343. But the same facts were brought out and made to appear in testimony introduced on the part of the defendant, and in a subsequent stage of the trial, too, this evidence was withdrawn by plaintiff's counsel from the consideration of the jury. Although there might be question as to whether such withdrawal cured the error of admission, (*Lafayette, Bloomington and Mississippi R. R. Co.* v. *Winslow*, 66 Ill. 223, and *Lycoming Fire Ins. Co.* v. *Rubin*, 79 id. 408,) yet in view of the like facts appearing in the testimony introduced by the defendant, we must regard the error of admitting the evidence as a harmless one.

The eleventh and fifteenth instructions asked on the part of the defendant were to the effect that if the sidewalk was constructed by the adjacent lot owners, and appeared to be in safe condition, the defendant could not be held liable, unless it had actual notice of the defect in the sidewalk, or that the defect existed for such a length of time that if the defendant had exercised reasonable or ordinary care and diligence, it would or should have known of the defect in time to have repaired the same before the falling of the sidewalk, to which the court added the following: "It being also the law, to be considered by the jury in connection with these instructions in this case, that where a corporation authorizes the lot owner to construct the sidewalk, it is the duty of such corporation to use ordinary care to see that it is constructed so as to be reasonably safe, and where it occupies and uses a sidewalk which has already been constructed by the lot owner, it is the duty of such corporation to use ordinary care to determine whether it has been so constructed as to be reasonably safe for persons using it with ordinary care and prudence." As thus modified, the court gave the instructions to the jury. It is insisted the instructions should have been given as asked, and that the modification of them was erroneous. The criticism made upon the language, that it *assumes* that the corporation authorized and directed the construction of the sidewalk, or that it was done under its supervision, when that was a contested point in the case whether the sidewalk was thus constructed or was built entirely by the lot owners, does not strike us as correct. The word "authorize," which is used, imports no more, that we see, than the corporation *allowing* the lot owner to construct the sidewalk, as he might do under the provisions of the ordinance of the corporation in evidence for building the sidewalk, levying a tax therefor, and declaring that if the lot owner made the sidewalk in conformity with the ordinance by a time named, he should not be taxed therefor. The instructions as asked

recognized the liability of the defendant if the defect in the sidewalk would have been discoverable by the exercise of ordinary care and diligence, and the modification made by the court was no more than that where the sidewalk was constructed by a lot owner by the permission and allowance of the corporation, it is the duty of the latter to use ordinary care and diligence to see that the sidewalk is reasonably safe. What was required by the instructions as asked, and as modified, was reasonable care and diligence in seeing to the safety of the sidewalk, and we perceive no such essential change in the modification of the instructions as to afford any substantial ground of complaint.

The refusal to give the sixteenth instruction asked by the defendant is complained of as error. This was a long instruction, reciting at length particulars of divers examinations as having been made by officers of the corporation for the purpose of ascertaining the condition as to safety of the sidewalk, and instructing if such examinations had been made, and the sidewalk appeared to be reasonably safe, and that afterward the defendant did not have any notice of the unsafe condition of the sidewalk long enough before it fell to have repaired the same, and if the sidewalk was originally constructed so as to be reasonably safe for public use, that then the defendant had exercised ordinary care and diligence to see that the sidewalk was reasonably safe for public use, and was not guilty of negligence entitling the plaintiff to recover. This instruction was objectionable in setting forth at length facts as testified to by defendant's witnesses, and upon the hypothesis of the belief of such facts directing the jury how to find. This form of instruction has been repeatedly condemned by this court. *Harris* v. *Cornell*, 80 Ill. 54; *Martin* v. *Johnson*, 89 id. 539; *Logg* v. *The People*, 92 id. 598; *Thorp* v. *Goewey*, 85 id. 612. The instruction was further faulty in detailing certain of the facts which would constitute ordinary care and diligence, instead of leaving it

to the jury to determine whether, from all the evidence in the case, there had been the exercise of due care and diligence on the part of the corporation. This instruction was properly refused.

It is complained that the damages are excessive. There was evidence going to show the injury to have been a very serious one, and of a permanent character, and we find no sufficient reason for disturbing the judgment on the ground last named, if it were one open to our consideration, as to which we express no opinion.

The judgment will be affirmed.

Judgment affirmed.

103 305
51a 80

THE UNITED STATES LIFE INSURANCE COMPANY

v.

CLARA LUDWIG.

Filed at Ottawa June 21, 1882.

1. PARTY—*plaintiff—on policy of insurance assigned.* Policies of insurance are but *choses in action*, and governed by the same principles applicable to *choses in action* in general. They are assignable in equity only, and in this State courts of law will not recognize the assignment so as to allow the assignee to sue on the policy in his own name.

2. The payment of a premium on a policy of life insurance by the assured, after an assignment to his children, for them, when the policy is to him and in his name, or even a payment by the assignees, when no new undertaking or promise is made to them, will not authorize a recovery in the names of the assignees, even under the common counts. The suit must be brought in the name of the party having the legal interest, though it may be for the use of the party having an equitable interest.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Statement of the case.

This was an action of assumpsit, by Clara Ludwig, who sues in her own right, and as guardian of Otto Ludwig and Emma Ludwig, minors, against the United States Life Insurance Company, on four policies of insurance issued by that company to Otto C. Ludwig, insuring his life. Each policy recites that "in consideration of the application therefor, signed by the assured hereinafter named, and submitted in writing by or for the assured, to the officers of this company subscribing this policy, which application is hereby referred to and made a part of this contract, and of each of the statements (warranties and agreements) made and contained therein, which, whether signed or written by his or her own hand or not, every person accepting or acquiring any interest in this contract hereby adopts as his or her own, admits to be material, and warrants to be full and true, and agrees shall be the only basis upon which this policy is issued; and in further consideration of the payment in advance to said company, at its principal office in New York City, by or for the assured under this policy, to-wit, Otto C. Ludwig, the person whose life is hereby insured (or any of the persons hereinafter called the 'assured'), of the first premium, to be evidenced by the receipt to be given therefor, signed by the president, secretary, assistant secretary, or actuary, and, thereafter, of the semi-annual premium of $18.90 on or before the twenty-sixth days of April and October in each and every year during the continuance of this policy, and as hereinafter provided, * * * this company agrees to pay to the said Otto C. Ludwig, his executors, administrators or lawful assigns, in three months after due notice and satisfactory proofs, as hereinafter required, of the death during the continuance of this insurance of the said person whose life is hereby assured as above, and proof of the just claim of the said assured, or of any other person, as child, guardian, executor or administrator, made or to be made under this policy, the balance of the year's premium, if any, remaining unpaid,

and any indebtedness to the company, being first deducted therefrom."

On the trial plaintiff also offered and put in evidence the renewal receipts for premiums on each of said policies. The last receipt for premium on each of the policies numbered 38,352 and 38,354, respectively, is in the following form:

"The United States Life Insurance Company in the city of New York.

$18.90. *Chicago.*

"Received this 26th day of April, 1880, eighteen and $\frac{90}{100}$ dollars, for the premium on policy of Otto C. Ludwig (policy No. 38,352), due at above date, hereby continuing the insurance thereunder for six months from above date, subject to all the provisions, conditions and agreements contained in the above mentioned policy, and the application therefor, and those indorsed hereon, all of which are hereby referred to and made part hereof.

C. P. FRALEIGH, Sec'y."

Indorsed on the face as follows:

"The within mentioned amount paid in cash, or check, good at bank, this 26th day of April, 1880, at Chicago, Ill.

E. W. CHAMBERLAIN, *Agent*,
Pr. B."

The printed provisions on the back of said receipt are omitted.

It was admitted that all of the premium receipts on the four policies in question (excepting the last receipt on policies numbered 38,352 and 38,354, as aforesaid,) are in the following form:

"United States Life Insurance Co., in the city of New York. *Chicago.*

"Received this 14th day of March, 1880, eighteen dollars from the owner of policy No. 38,355, on the life of Otto C. Ludwig, for the premium due at above date, continuing the

insurance thereunder for six months from above date, subject to all the provisions, conditions and agreements contained in the above policy and the application therefor, and those indorsed hereon, all of which are hereby referred to and hereby made part hereof.

C. P. FRALEIGH, Sec'y."

Indorsed on the face as follows:

"The within mentioned amount paid by the owner of the policy in cash (or check good at bank) this 3d day of March, 1880, at Chicago, Illinois.

E. W. CHAMBERLAIN, *Agent*,
Pr. B."

The printed portions on the backs of the receipts are omitted.

Otto C. Ludwig died July 31, 1880, and proofs of claim were made by the assignees of the policies. Defendant admitted that death was caused by pulmonary apoplexy, as stated in the proofs of loss. Defendant also admitted that demand of payment of the company was made by the plaintiff.

The assignment of the policies was as follows:

"For a good and valuable consideration, I hereby assign policies numbered 38,352, 38,353, 38,354 and 38,355, in the United States Life Insurance Company, in the city of New York, to my three children and sole heirs at law, Clara Ludwig, Otto Ludwig and Emma Ludwig, to have the moneys and benefits to accrue therefrom, share and share alike, between them.

"In witness whereof I have hereunto set my hand and seal, this 24th day of January, A. D. 1879.

OTTO C. LUDWIG. [SEAL.]

"Witness: ALBION CATE."

The signatures to the assignments were proved, and Otto Ludwig, one of the children of said Otto C. Ludwig, testified

that he took possession of the said assignments at the time they were executed; that the policies were delivered to him at the same time; that he put them in his father's safe; that they remained there, in the same package, until his father's death; that he had the combination of the safe, and his father had it also.

Albion Cate, a witness for plaintiff, who being shown the assignments, testified: "I think I drew it; that is in my handwriting, and that is Mr. Ludwig's signature; I saw him write it; don't remember now whether I sent a duplicate of that assignment to the United States Life Insurance Company; I sent an assignment to them; think I gave Ludwig the duplicate; am quite certain this is a duplicate of the one I sent to the company; they acknowledged the receipt of the letter; they said they would not acknowledge or accept a receipt until certain things were done."

Phillip Schick, on behalf of the defendant, being shown the receipts for payments on premium, before set out and referred to, testified: "I paid the money about the time it was due; I got the money to pay them from Mr. Otto C. Ludwig, who is now dead, at about the time the moneys were paid; I paid the premiums, back of this one, for the last two or three years; I got the money to make the payments from Otto C. Ludwig, deceased." On cross-examination he testified: "I know the money was Otto C. Ludwig's, because he took it out of the business drawer; the money was paid for the three children; the money was the money of Otto C. Ludwig."

The court instructed the jury orally, by consent of parties. The defendant then asked the court to instruct the jury, that if they believe, from the evidence of Mr. Schick, that the money paid for the premiums was the money of Otto C. Ludwig, that then, upon the evidence in this case, the plaintiff can not recover. To that the court said to the jury, that if Otto C. Ludwig paid this money for the premiums, intend-

ing it to be for the benefit of his children, after assigning the policies to them, that it is the same thing as though it had been paid with their own money. The defendant then asked the court to instruct the jury, that upon the evidence in this case the plaintiff is not entitled to recover, which said last mentioned instruction the said court then and there refused to give, for which refusal counsel for defendant then and there duly excepted.

The jury returned a verdict in favor of the plaintiffs, assessing their damages at $5272.78. Thereupon the defendant moved for a new trial, assigning therefor, among other causes, that the court gave improper instructions to the jury, and refused to give proper instructions to the jury asked for on behalf of defendant. The motion was overruled, and proper exception taken. Defendant appealed to the Appellate Court for the First District, where the judgment of the circuit court was affirmed. This appeal is from that judgment. The errors assigned bring before this court for review all the rulings of the Appellate Court.

Mr. FRANCIS H. KALES, for the appellant:

There is no evidence that the company ever assented to the assignment, although it had notice thereof; but had such been the case, it would not have been sufficient, under our law, to have authorized a suit to be brought in the name of the assignees of the contract. *Jessel* v. *Insurance Co.* 3 Hill, 88.

It is contended, on the part of the appellant company, that this action was not brought by the proper parties, and in support of this view the following authorities are cited: Bliss on Life Insurance, sec. 336, p. 553; May on Insurance, pp. 475–483; *Pomeroy* v. *Manhattan Ins. Co.* 40 Ill. 398; *Hartford Ins. Co.* v. *Olcott*, 97 id. 439; *Palmer* v. *Merrill*, 6 Cush. 282; *St. John* v. *Am. Mutual Life Ins. Co.* 13 N. Y. 31; *Jessel* v. *Insurance Co.* 3 Hill, 88.

Brief for the Appellee.

Messrs. HUTCHINSON & LUFF, for the appellee:

The policies expressly promise to pay "Otto C. Ludwig, his executors, administrators or lawful assigns," and the company can not question the right of the assignees to collect the insurance. Angell on Life and Fire Insurance, 325–328; Bliss on Life Insurance, secs. 325, 326.

The assured is dead, and suit could not be brought in his name. No administrator was appointed, and if there had been he would have had no interest in the policy. A court of equity could have no jurisdiction. *Taylor* v. *Turner*, 87 Ill. 296.

The assignee of a policy may sue in his own name when the premiums have been paid by him, or for his benefit. The proof shows that the premiums were paid for the benefit of the assignees. All the receipts given for the renewal premiums run to the "owner" of the policies, and not to the assured, except two, and as to those the receipts do not state from whom the money was received.

The payment of the premiums by the assignees, or for their benefit, after notice of assignment to the company, creates a new contract between the assignees and the company, and on that contract suit will be sustained. *Peoria Marine and Fire Ins. Co.* v. *Hervey*, 34 Ill. 46; *New England Fire and Marine Ins. Co.* v. *Wetmore*, 32 id. 221; *Westchester Fire Ins. Co.* v. *Foster*, 90 id. 122.

The declaration contains the common counts, and the suit may be sustained on the ground that assumpsit is an equitable action, in which the plaintiff can recover from the defendant so much money as he can show the defendant, *ex equo et bono*, ought not to retain. *Watson* v. *Wolverton*, 41 Ill. 241; *Belden* v. *Perkins*, 78 id. 449; *Hall* v. *Murston*, 17 Mass. 579.

Indeed, the court will find, upon examination, that in every case decided by this court wherein the right of the assignee of an insurance policy to sue in his own name has been in

question, save one, the judgment in his favor has been affirmed. *New England Fire and Marine Ins. Co.* v. *Wetmore*, 32 Ill. 221; *City Fire Ins. Co.* v. *Mark*, 45 id. 482; *Phœnix Ins. Co.* v. *Mitchell*, 67 id. 43.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

A single question arising on this record is presented for our consideration by the arguments of counsel: Are the plaintiffs entitled to prosecute an action at law, in their own names, on these policies?

Policies of insurance are but *choses in action*, and governed by the same principles applicable to *choses in action* in general. They are assignable in equity only, and in this State, and in others where the strict rules of the common law prevail, courts of law will not recognize the assignment so as to allow the assignee to sue on the policy in his own name. *New England Fire and Marine Ins. Co.* v. *Wetmore*, 32 Ill. 221; *Peoria Marine and Fire Ins. Co.* v. *Hervey et ux.* 34 id. 62; *Massachusetts Mutual Life Ins. Co.* v. *Robinson*, 98 id. 324; Bliss on Life Insurance, sec. 325; May on Insurance, sec. 377; *Jessel* v. *Insurance Co.* 3 Hill, 88; 2 Am. L. Cases, (5th ed.) 886, 887.

But counsel contend that "payment of the premiums by the assignees, or for their benefit, after notice of the assignment to the company, creates a new contract between the assignee and the company, and on that contract suit will be sustained," and they cite *Peoria Marine and Fire Ins. Co.* v. *Hervey et ux. supra*, *New England Fire and Marine Ins. Co.* v. *Wetmore, supra*, and *Westchester Fire Ins. Co.* v. *Foster*, 90 id. 122. Neither of these cases sustains the proposition so broadly and unqualifiedly as thus contended for by counsel. In the first named case, the case stated shows this: The property had been insured by Bishop. He sold and delivered it to the plaintiff, and on the same day, and with the consent of the defendants manifested by their indorsement

on the policy, assigned the same to the plaintiff. On the same day the defendants executed a renewal certificate in writing, and delivered it to the plaintiff, and in consideration of the sum of $45, paid by the plaintiff as premium to the defendants at their request, and of the undertaking and promises by the plaintiff to perform and fulfill all things contained in the policy to Bishop, on her part to be performed, etc., the defendants undertook and promised the plaintiff to consent to a continuance of the risk originally insured, from October 22, 1859, to October, 1860, and to become and be insurers to the plaintiff, of the sum mentioned in said policy, upon the property, and to fulfill all things mentioned in the policy, etc., and the court said: "The question before us is correctly put by the counsel for appellee: Can the plaintiff recover of this insurance company, in her own name, the amount of damages which they, as an insurance company, undertook and promised to pay her in case the property insured was destroyed by fire? Did the company enter into such a contract, on a valuable consideration, with the plaintiff? The fact that they had the year previous insured the property for Bishop, and that he assigned the policy to the plaintiff, does not, we think, affect one way or the other the real question stated above and presented by the record. * * * It amounts simply to this: that on the plaintiff going to the insurance company with the policy issued to Bishop in her possession, of which she was then the holder, on seeing it, the defendants, by their agent, say to her that she need not make a new application for insurance—that they would continue the risk for her benefit one year, on the payment by her of $45. That had no effect upon the written policy of Bishop to continue it alive, or to revive it, being dead, but it was a new contract with the plaintiff, for a valuable consideration paid, and on the terms of the original policy." And so it was held the action was properly brought in the name of the plaintiff—on the new contract, however,

and not on the original policy. In the next case, it was expressly held that the assignee of an insurance policy could not, at common law, maintain a suit upon it in his own name, and it was also further held that a renewal receipt, executed upon the payment of the premium by the assignees of a policy, whereby the policy was continued in force for another year, merely revived an expiring contract, and that suit must be brought on the original policy in the name of the assured therein. In the other case the policy was expressly payable to the beneficiary, and not, as here, to the assured, etc., and the question there was simply whether, under the language of the policy, the beneficiary could sue in his own name. That case is not at all analogous.

There was not here, as in *Peoria Marine and Fire Ins. Co.* v. *Hervey et ux. supra*, any new and independent contract. The suit here is not, as there, upon the agreement made when the premium was paid after the assignment. There was here no new insurance. The premiums paid after assignment are paid by the assured, not by the beneficiaries. It is true, as contended, this was done for them; but so were the premiums paid before assignment. The policies were, in the first instance, obtained by the assured for their benefit. The contracts, pursuant to which they were issued, and of which they are evidence, were, however, his contracts, made by him, and complied with by him both before and after the assignment. The contracts upon which suit is brought are his contracts,—his acts are in evidence,—and there is no suit upon contracts, and no evidence of the acts, of the beneficiaries. Even if the money here paid after the assignment, had been paid by the assignees out of their own funds, the case would be totally unlike that of *Peoria Marine and Fire Ins. Co.* v. *Hervey et ux. supra.* The old policy had not expired, and the case would then be strictly analogous to *New England Fire and Marine Ins. Co.* v. *Wetmore, supra,*— the revival of an expiring contract,—and on the authority of

that case the assignees could not sue in their own names. Indeed, the receipts here are, as there, expressly renewal receipts, on their faces. *Mutual Life Ins. Co.* v. *Robinson*, 98 Ill. 324, is in point, and conclusive against the plaintiffs.

The position that the present plaintiffs are entitled to recover under the common counts, in their own names, is untenable. The recovery must be on the policy, even if it be under the common counts. The suit must be brought by the party having the legal interest, although it may be for the use of one having an equitable interest. Dicey on Parties, 51, and notes.

The judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed.

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STEPHEN CLEMENT

v.

CHARLES REITZ *et al.*

Filed at Ottawa June 21, 1882.

APPEAL—*whether a freehold involved.* A proceeding to establish and enforce a mechanic's lien against land, does not involve a question of freehold any more than a bill to foreclose a mortgage, and hence this court has no jurisdiction to review a decree giving the lien, in the first instance, by writ of error to the trial court, brought by one claiming an interest in the land.

WRIT OF ERROR to the Circuit Court of Lake county; the Hon. THEODORE D. MURPHY, Judge, presiding.

Messrs. COOK & UPTON, for the plaintiff in error.

Mr. HENRY C. WHITNEY, and Mr. FRANCIS LACKNER, for the defendants in error.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

A number of parties commenced separate proceedings against James C. Hyde and others, by petition, to establish mechanic's liens against the lands described in the several petitions, for materials furnished by petitioners to Hyde, which were used by him in the construction of a building on the premises called the Glen Flora Hotel. After answers and replications were filed, the several causes, by order of the court, were consolidated, and tried as one cause. On the hearing the circuit court ascertained the amounts due the several petitioners for materials by them respectively furnished to Hyde for use in the building, and made the same a lien on the property, and decreed that in default of payment of the same the premises be sold in the usual way in such cases. Stephen Clement, who was named as defendant with the principal defendant as having some interest in the property, brings the case directly to this court on error.

It would seem, in a case of this kind, the real question involved is, whether the land can be subjected to the lien of the mechanics or material-men. Payment of the sum ascertained to be due to them would relieve the land entirely from the lien established. How, then, is a freehold any more involved than in a suit to foreclose a mortgage? It has frequently been decided by this court that in a proceeding by bill to foreclose a mortgage a freehold is not involved. No difference in principle is perceived in the cases. In one case the lien is created by mortgage-deed, and in the other it is given by statute, and the proceeding in either case is simply to foreclose the lien.

As no question is involved in this litigation that would give this court jurisdiction in the first instance to hear the case, the writ of error must be dismissed, which is done.

Writ of error dismissed.

Syllabus.

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THE CHICAGO LEGAL NEWS COMPANY

v.

THOMAS R. BROWNE *et al.*

Filed at Ottawa June 21, 1883.

1. PRACTICE—*as to specific objection—and time—substitution of assignee in bankruptcy as plaintiff.* Where a defendant suffers the assignees in bankruptcy of the plaintiff to be substituted as parties in his stead, without objection or exception at the time, and proceeds afterward to plead to the merits and go to trial, he waives any irregularity there may have been in the substitution, and it will be too late for him to move for a discontinuance for that cause after the case has been remanded from the Appellate Court. Such an objection should have been specifically taken before the first trial on the merits.

2. PLEADING AND EVIDENCE—*representative capacity of plaintiff—how put in issue.* Where the plaintiff sues in a representative capacity, as administrator, for example, if the defendant would contest his right thus to sue, he must make denial of it by plea. The general issue in such case is a waiver of all exception to the person of the plaintiff.

3. LANDLORD AND TENANT—*breach of landlord's agreement as to character of use of other portions of building—to defeat a recovery of rent.* Where a landlord agrees with the tenant at the time of making the lease of a portion of a building that he will not lease any other part of such building for a saloon, or for saloon purposes, in consideration of which the lease is accepted, a subsequent leasing of a part of such building, before the term expires, for the excepted purpose, and permitting it to be used for that purpose, when the original tenant does not leave the premises demised to him, but enjoys them for the balance of the term, will not defeat a recovery of the rent from the prior tenant for the time such other part of the building was so improperly occupied and used. Such an agreement is not a condition precedent to the right to recover rent, and does not go to the entire consideration, but is to be taken as a stipulation, the breach of which only gives an action for damages to the lessee.

4. The rule is well settled that the wrongful act of the landlord does not debar him from a recovery of rent, unless the tenant, by such act, has been deprived in whole or in part of the possession, either actually or constructively, or the premises are rendered useless.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. THOMAS A. MORAN, Judge, presiding.

Mr. FRANCIS H. KALES, for the appellant.

Mr. JAMES E. MUNROE, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action of assumpsit, brought by Edmund L. Davison, as plaintiff, on the 26th day of December, 1877, against the Chicago Legal News Company, on two leases under seal, to recover certain rents alleged to be in arrear. On the 9th day of February, 1878, the defendant filed the plea of the general issue, and two special pleas of set-off, alleging that it had suffered damages to its property by reason of intoxication of its employés, caused by the sale of intoxicating liquors in another part of the same building, a portion of which was leased to defendant, which damages the defendant offered to set off against the claims of the plaintiff. On October 15, 1878, the bankruptcy of plaintiff was suggested upon the record by plaintiff's counsel, and on his motion leave was granted to make and substitute Thomas R. Browne and F. R. Neale, Jr., assignees in bankruptcy of said plaintiff, parties plaintiff in place of said bankrupt. Afterwards there were other pleadings by the defendant to the merits, and trial had upon issues joined, resulting in a verdict and judgment in favor of plaintiffs, which judgment, on appeal to the Appellate Court for the First District, was reversed for error in the instructions given to the jury for the plaintiffs, and the cause remanded. (5 Bradwell, 250.) After the redocketing of the cause in the circuit court, defendant moved for a discontinuance of the case, which motion was overruled and exception taken. Another trial was had, which resulted in a verdict and judgment for plaintiffs, and the judgment was affirmed by the Appellate Court, and appeal taken to this court.

The judgment of the Appellate Court is conclusive upon the controverted questions of fact, and but two questions of

law are presented upon the record for our determination. One is, that the circuit court improperly permitted the assignees in bankruptcy to become parties plaintiff by substitution.

It is said there is no statute of this State authorizing the substitution; that the act of Congress authorizing such a substitution in some cases (Rev. Stat. U. S., sec. 5047,) is not a rule of practice for State courts, and that even within the act of Congress no case was made for the substitution, as it does not appear that at the time of the commencement of the proceedings in bankruptcy this action was pending in the name of the bankrupt debtor, nor even that it was pending at the time of the adjudication in bankruptcy. It is insisted, there being no statutory authority for the substitution, that the rule of the common law must govern, by which a change of parties after suit brought could be effected only by a *scire facias*, and that the irregularity of failing to sue out the writ of *scire facias*, and thus omitting to tender any issue as to the bankruptcy of Davison, and the appointment of his assignees, operated as a discontinuance. The register's deed of assignment in bankruptcy to the assignees was introduced in evidence on the trial, and sec. 5049, Rev. Stat. U. S., makes this deed conclusive evidence of title in the assignees; but admission of the deed was excepted to, and it is insisted that it was improperly admitted in evidence, since there was no issue in the case warranting its introduction. It is enough to say that this question as to substitution can not here be raised, because there was no exception taken at the time to the action of the court. This suffering the substitution to be made without objection, and proceeding afterward by pleading to the merits and trial thereon, was a waiver of any irregularity there might have been in making the substitution. It was too late to move for the discontinuance for such cause after the case had been remanded to the circuit court from the Appellate Court. The objection should have been speci-

fically taken before the first trial on the merits. When the plaintiff sues in a representative capacity, as administrator for example, if the defendant would contest his right thus to sue, he must make denial of it by plea. The general issue is a waiver of all exceptions to the person of the plaintiff. *Ballance* v. *Frisby*, 2 Scam. 63; *Collins* v. *Ayers*, 13 Ill. 358; *Christian Society, etc.* v. *Macomber*, 3 Metc. 235.

The other question arises upon the refusal of the following instruction, which was asked by the defendant:

"If the jury believe, from the evidence, that Davison, the lessor of the defendants, by himself or his agents, at the time of the making of said first lease, agreed with said defendant that if said defendant would lease the said premises of said Davison, and enter into the said lease, dated the 1st day of December, 1874, and take the same, that said Davison would not let or lease any other part of the said premises or building for a saloon, or for saloon purposes; and that in consideration of such agreement as last aforesaid, the defendant did enter into and take said lease; and if the jury further believe, from the evidence, that thereafter, before said lease expired, said Davison, without the consent or acquiescence of the defendant, did let a part of said building for a saloon, and permitted the same to be used as such, then the jury are instructed that said plaintiffs can not recover for rent for the time said Davison permitted said premises to be let and used for the purposes of a saloon."

The defendant did not leave the demised premises, but remained therein and enjoyed them for the full term. We fail to perceive that the performance of the agreement supposed, not to lease any other part of the building for a saloon, was a condition precedent to a right of recovery of rent, as the instruction makes it. The agreement was not made such a condition in terms. It did not go to the whole of the consideration, in which case such an agreement has been read as

a condition. It should be taken to be but a stipulation, the breach of which only gave an action for damages to the lessee. (2 Parsons on Contracts, 527.) It is but the amount of the damages from the violation of the agreement which defendant would be entitled to have, and as it might have been much less than the rent, it would be improper to instruct that there could be no recovery of rent for the time a part of the premises was leased contrary to the agreement.

The rule is well settled that the wrongful act of the landlord does not debar him from a recovery of rent, unless the tenant, by such act, has been deprived in whole or in part of the possession, either actually or constructively, or the premises rendered useless. *Edgerton* v. *Page*, 20 N. Y. 284; *Halligan* v. *Wade*, 21 Ill. 470; *Leadbeater* v. *Roth*, 25 id. 587.

Perceiving no error in the record, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

JOHN CARNE, JR. *et al.*

v.

ELLENOR M. TRUMAN.

103 321
35a 300

Filed at Ottawa June 21, 1882.

1. PRACTICE IN CHANCERY—*findings must support decree where the evidence is not preserved.* Where the evidence in a chancery suit is not preserved in the record, no presumptions can be indulged in this court as to what the court below found, but the findings must speak for themselves, and if they are not sufficient to sustain the decree, it will be erroneous, and must be reversed.

2. If there is in such a case a finding of facts sufficient to support the decree, this court will presume the evidence warranted the finding, when it is not preserved in the record.

3. Where copies of affidavits filed in the county clerk's office of the purchase of a lot for taxes, and of the service of notice of the time when the redemption will expire, are preserved in the record as exhibits, in a bill to

set the tax deed aside as a cloud upon the former owner's title, a finding in the decree of the court that said affidavits are null and void, and not in compliance with the statute, will not preclude this court from examining the exhibits to see if they are void, and not in compliance with the statute.

APPEAL from the Superior Court of Cook county; the Hon. GEORGE GARDNER, Judge, presiding.

Mr. JOHN P. WILSON, for the appellants.

Messrs. RICABY & LANDIS, for the appellee.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

This is an appeal from a decree of the Superior Court of Cook county, setting aside and directing to be delivered up for cancellation three several tax deeds held by appellants, as a cloud upon appellee's title to two lots situate in the city of Chicago, which she claims as owner in fee. The first two bear date September 9, 1879, and it is conceded the decree of the Superior Court as to them is proper, and hence there is nothing further to be observed as to them. The third deed is founded upon a tax sale of the 9th of October, 1878, for the taxes of 1876 and 1877, and bears date October 7, 1881. With reference to the tax proceedings upon which this deed rests, it is charged in the bill that "the provisions of law in regard to the assessment and sale upon which said tax certificates purport to have been based, have not been complied with; that although the time has elapsed during which said Coombs or his assigns was obliged to give complainant or her grantor notice of such sale, and of the time when redemption should expire, yet such notice has not been given by Coombs or his assigns, or anybody for him." This charge occurs in the original bill, which was filed more than two years after the sale, and before the execution of the last deed. After its execution a supplemental bill was filed by appellee, in which the additional charge is made "that said

last mentioned tax deed was obtained by said Coombs for the benefit of said Carne, and as the agent of said Carne, and that said last mentioned affidavits deposited with the county clerk of said Cook county, (a certified copy of said affidavits, marked exhibit 'A,' is hereto attached and made a part of this bill,) and which said affidavits are informal, uncertain, and are not in compliance with law; that complainant was not notified of said tax sale as required by law." These are all the averments contained in the bill, or supplemental bill, which in any view can be claimed to warrant the special finding upon which the decree is based.

The case was heard "upon the bill, supplemental bill, answers, replications and proofs taken in open court." The decree finds, "that the said three tax deeds, and each and every of them, based upon affidavits in said county clerk's office, which affidavits are null and void, and are not in compliance with the statute in such case made and provided," and the said deeds are set aside, declared "null and void," so far as they relate to the premises in question. The evidence upon which the decree is based has not been preserved, by a certificate of evidence or otherwise. In determining, therefore, whether it can be sustained, we must look alone to the averments in the bill, and the findings of the decree.

It will be perceived, from an examination of the decree, and from what we have already said, there is no direct finding with respect to the deed in question, or any other document, paper, or instrument, or step taken in the tax proceeding, except as to the affidavits relating to notice. It follows, therefore, if this decree can be sustained at all, it is on the ground the affidavits in question are not in conformity with the statute. Whether they are or not presents a pure question of law, for they are set forth in the record *in hæc verba*, as an exhibit of the supplemental bill. The decree does not specify in what respect they are insufficient, and if they are not in conformity with the statute, the imperfection, whatever it

may be, has escaped our attention, and counsel for appellee have failed to point it out in their brief.

It is suggested that as the record shows proofs were taken in open court, and the evidence is not preserved in the record, this court must presume the evidence heard "rendered these affidavits nugatory." But this is a misapprehension. As the evidence is not preserved, we can indulge in no presumptions as to what the court found. The findings of the court must speak for themselves, and if they are not sufficient to sustain the decree, it will be erroneous, and should be reversed. If, however, there is, in such case, a finding of facts sufficient to support the decree, then this court will presume the evidence warranted the finding. Had the bill in this case, instead of alleging the affidavits void, as was done, charged the facts set forth in them were untrue, as is claimed, and the court had so found, we would presume the evidence warranted the finding, and should affirm the decree. But such is not the case. The decree and the pleadings on behalf of appellee are very loosely drawn, and if what is claimed by her counsel is true, the result of the case in this court would have been otherwise had her learned counsel been more careful in their preparation.

The decree of the circuit court as to the deed of October 7, 1881, will be reversed, and the cause remanded for further proceedings, with leave to the parties to amend their pleadings, and take further testimony, if they shall be so advised.

Decree reversed.

Syllabus.

THEODORE FREYDENDALL *et al.*

v.

LYMAN BALDWIN *et al.*

Filed at Ottawa June 21, 1882.

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—*what property passes thereby.* A voluntary assignment, made by a failing debtor for the benefit of his creditors, if valid, passes all the property, real and personal, which the debtor at the time owned.

2. SAME—*jurisdiction of county court—creditor's bill—whether it will be entertained in chancery.* In case of such assignment, the county court, by the statute, is invested with complete and full jurisdiction over the trust fund and the assignee, until the property is disposed of and the proceeds distributed to those entitled to share therein, and a court of equity, on creditor's bill, where the assignment is not questioned or impeached, will not assume jurisdiction to manage and direct the application of such fund by the assignee, unless under special circumstances, but will leave that to the county court.

3. Where a debtor has made a valid general assignment, under the statute, of all his property and effects, for the benefit of creditors, a creditor having a judgment can not maintain a bill in equity to have prior judgments against his debtor set aside on the ground they are void or fraudulent. His remedy in such a case is before the county court, which has the power to determine what creditors are entitled to share in the proceeds of the debtor's effects, and the priority of the equitable liens of the several creditors.

4. Whether judgments confessed by the insolvent debtor are void for any reason, or whether executions issued on such judgments were satisfied by a technical levy on personal property and its release, or whether such judgment creditors are entitled to priority over the other creditors by reason of their execution liens at the time of the assignment, are questions within the jurisdiction of the county court, to be decided by it in its supervision and direction of the settlement and distribution of the trust funds in the hands of the assignee.

5. The whole management of the estates of insolvent debtors, under voluntary assignments, is by law committed to the jurisdiction of county courts. How the funds in the hands of the assignee are to be paid over and distributed, are matters for the determination of the county court where the proceedings are pending, and its judgments and orders in that respect can only be reviewed on appeal or error.

6. CHANCERY—*waiver of relief sought in bill.* Where a creditor's bill asked that a voluntary assignment of a debtor, for the benefit of creditors, be

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set aside as fraudulent, but the matter was not pressed in the court in which the cause was first heard, nor in the Appellate or this court, counsel stating in this court that his position is not hostile to the assignment: *Held*, that the part of the bill seeking to have the assignment set aside must be treated as having been waived.

7. JUDGMENT—*when a stranger may attack it.* A judgment or decree absolutely void for want of jurisdiction in the court, may be assailed by a stranger to the record, if it affects his prior or superior equities. Otherwise he can not intermeddle with it.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the City Court of Aurora; the Hon. C. D. SMITH, Judge, presiding.

Mr. CHARLES WHEATON, and Messrs. NICHOLS & CLAPSADDLE, for the appellants.

Mr. A. J. HOPKINS, and Mr. N. J. ALDRICH, for the appellee the Second National Bank of Aurora.

Mr. R. G. MONTONY, for the appellees Rebecca M. Baldwin, Nellie E. Higgins, and Susan S. Jenks.

Mr. EUGENE CANFIELD, for the appellee William F. Dickinson.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

The bill in this case was brought by a number of the judgment creditors of William Lawrence & Co., and the object was to set aside as fraudulent a voluntary assignment made by that firm, under the provisions of the statute, to William F. Dickinson, on the 25th day of January, 1879. Incidentally to the principal relief, it was sought to set aside a judgment in favor of the Second National Bank of Aurora, also one in favor of Rebecca M. Baldwin, one in favor of Nellie E. Higgins, and one in favor of Susan S. Jenks, because such judgments were alleged to be fraudulent as to complainants. It is also alleged a number of conveyances of real estate

made by the judgment debtors to parties named, were fraudulent as to complainants, and should be set aside, and the property subjected to the payment of their respective judgments.

It appears the judgments in favor of the bank and other defendants were all obtained prior to the assignment, and it is charged in the bill that executions issued on such judgments were levied on a stock of merchandise owned by the judgment debtors before the assignment, or at least before the assignee got possession of the goods, and that when the assignee went to take possession of the property, a deputy sheriff had made, or was about to make, a levy on the goods under the executions in his hands. An arrangement was then made between the assignee and the sheriff, with the written consent of all the execution creditors interested in the executions in his hands, if the county court would permit the same to be done, to allow the assignee to take possession of and sell the goods at private sale, and pay the proceeds realized to the deputy sheriff, until the executions in his hands should be satisfied. A petition was accordingly presented to the county court for the leave desired, which was granted. It was under that arrangement the assignee took possession and proceeded to sell the goods, and from time to time paid over to the sheriff or his deputy the proceeds, which, it is alleged, amounted to a large sum of money. The prayer of the bill is, that the assignment to Dickinson be set aside as fraudulent and void as to complainants, and that a receiver be appointed, and that the execution creditors—the sheriff having the executions in his hands—and the assignee, all be required to account to such receiver for any money or property in their hands that may have come to them under the assignment, or otherwise, belonging to the judgment debtors, to be appropriated in satisfaction of the judgments in favor of the several complainants. On the hearing the court set aside the judgments in favor of Mrs. Baldwin, Mrs.

Higgins and Mrs. Jenks as fraudulent and void as to complainants, and dismissed the original bill so far as it asked other relief. On appeal to the Appellate Court for the Second District, that decree, in so far as it set aside the several judgments mentioned, was reversed, and that part of the bill which asked relief as to them was dismissed, but in all other respects the decree of the circuit court was affirmed, and now the original complainants bring the case to this court.

The bill in this case is in the strictest sense a creditor's bill. It seeks a discovery of assets alleged to be in the hands of persons made defendants, and that the same may be paid to a receiver to be appointed by the court, and to be ultimately appropriated to the payment of complainants' judgments against the debtor firm. Specific relief is sought concerning certain matters: First, that the assignment made by the judgment debtors on the 27th day of January, 1879, to William F. Dickinson, be set aside as fraudulent as to complainants; and second, that the judgments in favor of the Second National Bank, and in favor of Mrs. Baldwin, Mrs. Higgins and Mrs. Jenks, be all set aside as null and void, because such judgments were all confessed on notes ante-dated, and that the same were not in fact due at the time such judgments were confessed by the attorney in fact of the makers, or that such judgments shall be decreed to be satisfied, because the executions issued thereon were levied by the sheriff on personal property of the execution debtors of sufficient value to satisfy them, and which property was afterwards, with the consent of the execution creditors, surrendered to the assignee of the judgment debtors.

It is a proposition that needs nothing in its support, if the voluntary assignment made by the failing debtors was valid, all the property, real and personal, which they owned at the time passed to their assignee, under the provisions of the statute. Unless, therefore, the assignment could be set aside for some valid reason, it is not perceived what standing com-

plainants can have in a court of equity. A creditor's bill proceeds on the ground complainant therein has a judgment at law that is a lien upon the property of the debtor, no matter in whose hands it may be, and the aid of a court of chancery is invoked to assist in subjecting it to the payment of his judgment. While it is true in this case the bill asks that the assignment be set aside, the matter was not pressed on the attention of the court in which the cause was first heard, nor was it in the Appellate Court, or in this court. Counsel now states his position is not hostile to the assignment. That being so, that part of the bill that asks to have the assignment set aside may be held as having been waived. No reason is or has been suggested why the assignment is void. It seems to have been made in conformity with the statute, and no cause is shown why it may not stand.

Treating the assignment, as must be done, as valid in law, it is difficult to comprehend on what principle complainants can demand of a court of equity the incidental relief sought by their bill. Certainly they can not demand that the judgments at law in favor of defendants against the common debtors shall be set aside, unless they are in some way injuriously affected by them, and then only to the extent such judgments interfere with their prior or superior equities. Whether such judgments are absolutely void for want of jurisdiction in the court to render them, is a matter in which complainants have no concern. That question can only be made by a party to the record. A judgment or decree absolutely void for want of jurisdiction in the court, if it affects his prior or superior equities, may be assailed by a stranger to the record. Otherwise he may not intermeddle with it.

All the property the insolvent debtors had at the time of the assignment passed to and vested in the assignee under the statute, and must be administered by him under the supervision of the county court. Section 7, of the act of 1877, in relation to voluntary assignments, makes the assignee

subject to the supervision of the county court, and such court may, by citation or attachment, compel the assignee to file reports of his proceedings, and of the situation and condition of the trust, and to proceed in the faithful execution of the duties required of him by law in relation to the complete and final distribution and paying over of the proceeds derived from the trust, or any part thereof, until a final settlement and distribution are made. Thus it is seen the whole management of the estates of insolvent debtors, under voluntary assignments, is committed to the jurisdiction of county courts, and by section 14, full authority and jurisdiction are given to such courts in regard to such matters. How the trust funds in the hands of the assignee are to be paid over and distributed, are matters for the determination of the county court where such proceedings are pending, and its judgments and orders in that respect can only be reviewed as the judgments and decrees of other courts of competent and original jurisdiction are reviewable by appellate courts. It was entirely competent for the General Assembly to confer such jurisdiction on county courts, and their jurisdiction in such matters is too manifest to be disputed. Certainly a court of chancery will not assume jurisdiction on a bill to interfere and direct how the county court shall distribute a trust fund over which it has full and complete jurisdiction by positive statute, unless under special circumstances. Although this bill is not framed with a view to obtain any such relief, counsel now say in argument they "do not repudiate the assignment," but "claim under it," and are seeking to enforce their "equitable liens under it." That a court of chancery will not aid them to do, when another court under the statute has full and complete jurisdiction over the subject. The power of a court of chancery to so interpose and wrest from the county court that jurisdiction it has by law in such matters, is not referable to any known head of equity jurisdiction. And since the county court has first obtained

jurisdiction, and may be presumed to be exercising it according to law, to that court complainants will be remitted for any relief, if any, to which they may be entitled.

Whether the judgments confessed in favor of defendants were void for any reason, or whether the executions issued on them were satisfied by a technical levy on personal property, when in fact they were not satisfied, or whether defendants are entitled to any priority over other creditors, by reason of their execution liens, in the distribution of the trust funds, are questions within the jurisdiction of the county court, and to be determined by it as it shall proceed in the supervision and direction of the settlement and distribution of the trust funds in the hands of the assignee. These questions must necessarily arise, if they have not already been determined, in that court, when it comes to make the necessary orders for paying over and distributing the trust funds preparatory to final settlement. Should this court now express an opinion upon them, it would answer no purpose other than to advise the county court of its opinion should the same questions be raised in that court, if they ever shall be. That would be a work of supererogation. It will be presumed the county court is entirely competent to determine all questions that may arise within its jurisdiction concerning the trust property which the law has placed under its immediate supervision.

The judgment of the Appellate Court is clearly right, and must be affirmed, which is done.

Judgment affirmed.

Mr. JUSTICE WALKER: I deny the power of the court of chancery to take jurisdiction in any case pending in the probate court, of which it has complete jurisdiction. It is, I think, unprecedented, and therefore dissent to so much of this opinion as seems to hold it may be done under special or any circumstances.

Syllabus.

JOHN A. SMITH *et al.*

v.

MARY A. WEST *et al.*

Filed at Ottawa June 21, 1882.

1. WITNESS—*competency—defendant in chancery for a co-defendant.* Where a party defendant in a suit in chancery disclaims any interest in the subject matter of the litigation and the result of the suit, he is a competent witness, both at common law and under the statute, for his co-defendants. Under the practice in chancery, a defendant might always testify for a co-defendant, if his evidence did not necessarily involve his own interest.

2. REMAINDERS—*of vested and contingent remainders.* Where a conveyance of a particular estate is made to support a remainder over, the tenant for the particular estate takes it, and if the remainder-man is in being, he takes the fee. In such a case the remainder is not contingent as to its becoming a vested remainder, because the title vests in the remainder-man on the delivery of the deed. The title thus vested becomes an estate of inheritance, and in case the remainder-man dies before the previous estate is expended, the title passes to his heirs, unless the deed directs otherwise.

3. A remainder is vested when there is a fixed right of future enjoyment. A vested remainder is a fixed interest, to take effect in possession after the intervening estate is spent or ceases, but if it be uncertain whether a use or estate limited *in futuro* shall ever vest, that use or estate is contingent. The fact, however, that the remainder-man may die before the tenant for life, will not affect the vested nature of the estate. It is the present capacity of taking effect in possession, in case the prior estate were determined, that distinguishes a vested from a contingent remainder.

4. Where a conveyance is made to a woman, of a life estate, and the remainder to the children of her body, or such as may be living at her death, or the descendants of any one that may be then deceased, it will pass immediately to her children a vested remainder in fee, and not a contingent remainder.

5. STATUTE OF FRAUDS—*sale of land by parol—performance to take a case out of the statute.* The owner of several tracts of land sold one of them to his agent in this State in consideration that the latter would fence certain others of the remaining tracts, which the agent did according to the terms of the agreement, though no written contract was made, and in 1856 took actual possession of the tract so sold him, inclosed the same, and put a part of it in cultivation, and made valuable and lasting improvements thereon, and kept such possession until in 1879, when he conveyed the same to a woman for life, with remainder to the children of her body. It was *held*, that these facts

Brief for the Appellants.

were sufficient to take the case out of the Statute of Frauds, and that the conveyance vested in his grantees an equitable title to the premises conveyed.

6. EVIDENCE—*as to ownership of land—by paying taxes in former owner's name.* Where a person claimed to have purchased a tract of land from a non-resident owner, for whom he was agent in respect to a large number of other tracts, the alleged purchase being a verbal one, and during a period of thirty years afterward, in paying taxes as agent on his principal's other lands, he included his own tract in his principal's list of lands, but there was no proof that he ever charged the taxes on his tract to the principal in any of their settlements: *Held*, that this was likely a mistake, and the facts did not afford sufficient evidence to show that his claim to the tract alleged to have been bought, was unfounded.

7. CHANCERY—*affirmative relief on answer not proper.* A defendant is not entitled to affirmative relief on his answer alone, when it is not made a cross-bill. To obtain such relief it must be on original or cross-bill.

APPEAL from the Circuit Court of Henry county; the Hon. JOHN J. GLENN, Judge, presiding.

Mr. JAMES E. MUNROE, for the appellants:

The defendant Allan could not render himself a competent witness for his daughter, Mrs. West, by disclaimer. A defendant can not, by disclaiming, deprive the complainant of a full answer to his bill, unless it is evident the defendant should not, after the disclaimer, be continued a party to the suit. *Ellsworth* v. *Curtis*, 10 Paige, 105; *Glassington* v. *Thwaites*, 2 Russ. Ch. 458.

If Allan was a proper or necessary party to the suit, or was interested adversely to appellants, he was not competent to testify against them as to any facts occurring between him and their ancestor before his death. The fact that he made a deed of this land to Mrs. West made him a proper party to the bill, so far as it sought to remove such conveyance as a cloud upon complainants' title. *Himes* v. *Keightlinger*, 14 Ill. 469; *McEuan* v. *Kerfoot*, 37 id. 530; *Philpot* v. *Taylor*, 75 id. 309; *Brady* v. *McCosker*, 1 Comst. 214; *Bowles* v. *Stewart*, 1 Schoales & Lef. 227; *Gaylord* v. *Kelshaw*, 1 Wall. 82; *Ward* v. *Hollins*, 14 Md. 158; *Bulkeley* v. *Dunbar*, 1 Aust. 37; *Graham* v. *Coape*, 9 Simons' Ch. 93; *Whiting* v.

Rush, 2 Young & Col. 546; 1 Daniell's Chancery Practice, 707, 708; *Robinson* v. *Davis*, 11 N. J. Eq. 305.

If there remains any interest, right or liability of the assignor which can be affected by the decree, he is a necessary party. Barbour on Parties, 463; Story's Equity Pleading, sec. 153; *Montague* v. *Lobdell*, 11 Cush. 111; *Thompson* v. *McDonald*, 2 Dev. & Bat. 463.

Allan's deed to Mrs. West conveyed to her only a life estate, and the remainder to the children of her body who might survive her is purely contingent. *Beacroft* v. *Strawn*, 67 Ill. 28; *Thompson* v. *Luddington*, 104 Mass. 193; *Olney* v. *Hull*, 21 Pick. 311; *Stevens* v. *Evans*, 30 Ind. 37; *Johnson* v. *Jacob*, 11 Bush, 646; *Williamson* v. *Williamson*, 11 B. Mon. 368; *Robertson* v. *Wilson*, 38 N. H. 38; *Augustus* v. *Seabolt*, 3 Metc. (Ky.) 162; *Price* v. *Hall*, 5 Law Rep. Eq. Cas. 399; *Festing* v. *Allen*, 12 Mees. & W. 278; *Smith* v. *Rice*, 130 Mass. 141; *Duffield* v. *Duffield*, 3 Bligh, (N. R.) 334; 2 Blackstone's Commentaries, 169; Fearne on Contingent Remainders, 8, 9, 351; Washburn on Real Prop. *263, 264.

The deed of Allan to West is a deed operating by way of use, under the Statute of Uses. *Shackleton* v. *Sebree*, 86 Ill. 621.

When possession is relied on to take a case out of the Statute of Frauds, it must affirmatively appear that the party obtained possession under the agreement and in part performance of the same, and the improvements must have been made under the contract itself. *Pickerell* v. *Morse*, 97 Ill. 220; *Padfield* v. *Padfield*, 92 id. 190; *Wood* v. *Thornly*, 58 id. 464.

Mr. CHARLES DUNHAM, for the appellees:

Mr. Allan was a competent witness for the defendants after being dismissed as a party on his disclaimer, and, indeed, before it was shown he had no interest in the land.

The charge of the taxes on this land for two of the various years, was through mistake in paying on a long list of lands. This tract was listed in Allan's name during those years, and Allan swears he paid all the taxes on this tract out of his own means.

It is contended that the remainder in Allan's deed to the children of Mrs. West is contingent. The uncertainty as to whether they will ever enjoy the estate, does not determine whether their remainder is vested or contingent. Such an estate is vested in interest when the person is in being, and ascertained, who will, if he lives, have an absolute and immediate right to possession upon the termination of all the precedent estates, provided the estate limited to him shall last so long. *Howley* v. *James*, 5 Paige, 466; 2 Blackf. 169; 2 Cruise, 270; 4 id. 260; Fearne, 216.

As to the proper distinction between a vested and contingent remainder, and to show that the children of Mrs. West took by Allan's deed a vested remainder, counsel also cited the following other authorities: *Moore* v. *Littel*, 41 N. Y. 72; *Lawrence* v. *Bayard*, 7 Paige, 75; *Vanderheyden* v. *Crandall*, 2 Denio, 18; 4 Kent's Commentaries, *202; 1 Hilliard on Real Property, 513, 518, 526 a, 527, 528, 529.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a bill, filed by appellants, against Mary A. West and against minor heirs claiming to have an interest in common with complainants, for the partition of the north-west quarter of section 8, town 17 north, range 3 east of the fourth principal meridian, in Henry county, and to remove a deed to her from her father for the land, as a cloud on their title.

It appears that Allan, the father of Mrs. West, entered the land in controversy, with quite a number of other tracts of land, for David A. Smith, in the year 1836; that the title to this tract stood in the name of Smith until the time of his

death, which occurred on the 13th of July, 1865, and his will was probated on the 26th of that month, and by it his ten children, as devisees, became invested with the title to this land, if he held any at his death. The bill, as finally amended, claimed that complainants owned the title.

It was set up in the answer that Smith sold this tract to Allan in consideration that he would fence certain other of Smith's lands, which he did according to the terms of the agreement; that he, in 1856, took the actual possession of and enclosed it, and put about twenty acres into cultivation, and had been in the actual and exclusive possession of it ever since, until he sold it to Mrs. West, by quitclaim deed, on the 10th day of July, 1879, and she had been so in possession ever since, claiming it as the owner. Complainants on leave amended their bill, and made Allan a party defendant. He thereupon filed a disclaimer to all interest in the premises. He alleges that he does not claim, and has not claimed since before the filing of the first amended bill therein, any right, title or interest in or to the estate or premises described in the bill, and disclaims all interest and right of every kind in the estate or premises. Complainants filed a replication to Mrs. West's answer, and also a replication to Allan's disclaimer. A trial was first had on Allan's disclaimer, and the issue was found in his favor. A trial was subsequently had on the bill as amended, and Mrs. West's answer, and the court found in her favor, and rendered a decree dismissing the bill at complainants' costs, and they appeal to this court.

Whether the practice of trying the issue on Allan's disclaimer was or not correct, can not matter, as from the evidence in the case he was a competent witness, both at common law and under the statute. It clearly shows he had no interest in the result of the suit. Under the practice in chancery a defendant might always testify for a co-defendant, if his evidence did not necessarily involve his own inter-

est, otherwise a complainant could have prevented a witness from testifying, simply by making him a defendant to the bill.

It is urged that Allan's deed to Mrs. West only having conveyed a life estate to her, and a remainder to the children of her body, or such as might be living at her death, or the descendants of any one that might be then deceased, the fee remained in him or his heirs until her death, and the fee would not vest in the remainder-man until the life estate should be expended, and hence the remainder was contingent. We do not so understand the rule. We understand it, that when a conveyance of the particular estate is made to support a remainder over, the tenant for the particular estate takes it, and if the remainder-man is in being, he takes the fee. In such a case the remainder is not contingent as to its becoming a vested remainder, because the title vests in the remainder-man on the delivery of the deed. The title thus vested becomes an estate of inheritance, and in case the remainder-man dies before the previous estate is expended, the title passes to his heirs, unless the deed directs otherwise.

Fearne, in his work on Remainders, p. 1, in defining them, says: "An estate is vested when there is an *immediate right* of present or future enjoyment. An estate is vested *in possession* when there is a *right* of *present* enjoyment. An estate is *vested in interest* when there is a present fixed *right* of *future* enjoyment. An estate is *contingent* when a *right* of enjoyment is to accrue on an event which is *dubious* and uncertain." Here the event is not uncertain. The children of Mrs. West were in being. Her death is certain to occur, although the time is dubious.

Chancellor KENT, vol. 4, p. 202, defines a vested remainder thus: "A remainder is vested when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment. It gives a legal or equitable seizin. * * * A vested remainder is a fixed interest, to take effect in possession after a particular estate is spent. If it be uncertain

whether a use or estate limited *in futuro* shall ever vest, that use or estate is said to be a contingency. But though it may be uncertain whether a remainder will ever take effect in *possession*, it will nevertheless be a vested remainder if the interest is fixed. * * * Every remainder-man may die, and without issue, before the death of the tenant for life. It is the present *capacity* of taking effect in possession, if the possession were to become vacant, that distinguishes a vested from a contingent remainder. When the event on which the preceding estate is limited must happen, and when it also may happen before the expiration of the estate limited in remainder, the remainder is vested, as in the case of a lease to A for life, remainder to B during the life of A, the preceding estate determines on an event which must happen, and it may determine by forfeiture or surrender before the expiration of A's life, and the remainder is therefore vested." The definition and illustrations which he gives are taken from the unquestioned doctrines as collated by Fearne, Cruise, and other commentators of acknowledged authority, and fully supported by adjudged cases.

The application of the rule is well illustrated by Chancellor WALWORTH, in *Hawley* v. *James*, 5 Paige, 466. He says: "A remainder is vested in interest where the person is in being and ascertained, who will, if he lives, have an absolute and immediate right to the possession of the land upon the ceasing or failure of all the precedent estates, provided the estate limited to him by the remainder shall so long last,—in other words, where the remainder-man's right to an estate in possession can not be defeated by third persons, or contingent events, or by a failure of a condition precedent, if he lives, and the estate limited to him by way of remainder continues till the precedent estates are determined, his remainder is vested in interest." So, in *Moore* v. *Littel*, 41 N. Y. 72, it is said: "Decisions and text-writers agree, that by the common law a remainder is vested where there is a person

in being who has a present capacity to take in remainder, if the particular estate be then presently determined; otherwise the remainder is contingent. It is said that before the remainder is vested the person must be ascertained, and in this sense that is perfectly true. The person must be one to whose competency to take no further or other condition attaches, etc., *i. e.* in respect to whom it is not necessary that any event shall occur, or condition be satisfied, save only that the precedent estate shall determine."

In this case, under all of the conditions of the rule, the remainder passed from and vested in the children of Mrs. West. They were then in being, were ascertained and designated as the remainder-men, and were capable of, and did take, a vested remainder, and as has been seen, their death before their mother, without issue, would not prevent or defeat the vested remainder,—it would in such a case descend to their heirs. But whatever may become of the estate in the future, we have no doubt it vested in the children of Mrs. West when the deed was delivered. It then follows that Allan had parted with all of his title by conveying the land, and was not incompetent as a witness, because he held no title to or an interest in the land.

Nor is there the slightest force in the objection that Allan reserved a lien of $5000 on the land. That was fully paid before he was made a party to the suit. He therefore held no title to or interest in the land, immediate or remote, direct or collateral, and was competent to testify.

It is urged, however, that the evidence of Allan does not sustain the decree. It is clear, consistent, reasonable, and apparently fair. If it is to be believed, it is ample. He specifies the time, place and terms of the purchase. They are sufficient in every respect to have authorized the specific performance of the contract, had it been asked by original or cross-bill in the case. Its terms are not doubtful or ambiguous, and Allan swears that he did all things required

by the agreement, and performed it in full; that he took possession of the property, and made lasting and valuable improvements on it, by fencing the entire tract, and breaking and cultivating a part. This was sufficient to take the contract out of the statute and vest an equitable title in Allan, and he conveyed it to Mrs. West, who continued the possession. If, then, this testimony is reliable, it sustains the decree.

It is urged that the evidence of Allan is not reliable, because, it is insisted, he was mistaken in the date of one or two occurrences. There is, perhaps, nothing more difficult to remember than precise dates. After many years but few can from memory even approximate them. If the evidence of witnesses depended for credence on accuracy in such matters, but few would stand the test. Again, Allan had his house and all of his papers destroyed before he testified, and labored under the disadvantage of not having his books and memoranda from which to refresh his memory. That he could not remember dates, or even should forget occurrences through a period of thirty years, is not surprising, but on the contrary was to be reasonably expected.

It is urged that Allan, two or three years, in paying taxes on Smith's list of lands, included this, and thus showed he had no claim to it. That such a mistake might occur in paying taxes on a considerable list for thirty years is not surprising; nor does it appear that although paid in Smith's name the money was not furnished by Allan, and the amount of the taxes on this tract never charged to Smith in their settlements during his life, or with the executor after his death. Neither is alive, nor did complainants produce Smith's books to repel that conclusion. On the other hand, this tract seems to have always been assessed in Allan's name, when none of the others were. He took possession of this tract and used it, but there is no pretense that he did either of the others. These are circumstances strongly corroborating his evidence. The circumstances relied on to

impeach his positive, clear, and apparently fair and truthful evidence, are too slight to induce us to disbelieve and reject it as untrue. He and Smith were brothers-in-law, and were on the most friendly and confidential terms, and from that fact dealt and acted with less care than had they not been thus connected by family ties. They seem to have had unshaken faith in the fairness and honesty of each other, hence writings were not drawn to evidence their contracts. Allan's agency was not in writing, nor did receipts pass on settlements, so far as we can learn from this record; nor did they ever, so far as we can see, have the slightest difference in reference to this or any other matter. From their relations they did their business more loosely and with less care than would strangers or persons having less confidential relations. We, on a careful examination of the evidence, believe it is true in all of its essential particulars, and that it fully supports the decree.

The views here expressed render it unnecessary to discuss the question whether the Statute of Limitations has barred the suit. If, as we have seen, Allan purchased the land from Smith, and performed the agreement on his part, after having entered into possession under the contract, that affords a complete bar to the relief sought.

It is urged that the court erred in decreeing the fee to be in Mrs. West and her children. A defendant is not entitled to relief on an answer alone, whatever the evidence may be on the hearing. To obtain relief it must be on an original or cross-bill. None was filed in this case, nor was the answer made a cross-bill, according to the rule announced in *Thielman* v. *Carr*, 75 Ill. 385, and *Purdy* v. *Henslee*, 97 id. 389, and in this there was error. On the evidence heard the court should have dismissed the bill, at the costs of complainants.

So far as the decree affords relief, beyond the dismissal of the bill, it will be reversed, but in all other respects affirmed, and the costs of this court will be equally divided.

Decree reversed in part and in part affirmed.

Syllabus.

THE CITY OF CHICAGO *et al.*

v.

JOSEPH G. HALL *et al.*

Filed at Ottawa June 21, 1882.

1. APPEAL—*what matters involved—where there are several suits relating to the same subject matter.* Several chancery suits were consolidated and heard together, and certain of the defendants who had brought suits at law to enforce the individual liability of stockholders, and whose suits had been enjoined in the chancery suits, filed a petition claiming priority, by reason of the institution of their suits at law, of the funds collected from such stockholders. On overruling a demurrer to the petition, the claim of priority was allowed, and from that order the other parties appealed: *Held*, that the appeal only brought before the court of review the proceedings had upon the petition filed in the consolidated cases.

2. LIEN—*priority of right—when not acquired merely by the institution of suit.* The mere institution of a suit at law by one of several creditors of an insolvent bank to enforce the personal liability of a stockholder for the payment of his claim, does not give him a prior right or lien on the fund when collected, to the exclusion of all other creditors of the bank, and the fact that such creditor was prevented from obtaining final judgment in his suit at law by injunction on bill filed by other creditors, after the bringing of the suit at law, can make no difference. Such fund, when collected of the stockholder, under decree in the suits in chancery, is for the benefit of all the creditors who are parties to the suits in equity. In this State it is the final judgment or decree of the court which creates a lien.

3. DECREE—*conclusive on parties.* Where a suit at law by a creditor of an insolvent bank against a stockholder to enforce his personal liability to creditors, under the bank charter, is enjoined in equity by other creditors of the bank, seeking by bill to have the liability of the stockholders enforced as a fund for the payment of creditors, and the stockholders discharge their liability, as found by the decree of the court under the bill, by payment of the sum found against them, and such decree has been affirmed by this court, the decree must stand forever as conclusive of the rights of all persons affected by it, and the fund must be administered by the court on the principles of equity and equal justice, and no priority can be given to the creditor whose suit at law was stayed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

Messrs. MASON BROTHERS, for the appellants:

A court of equity which takes jurisdiction for one purpose takes it for all,—it does not do justice by halves. *Taylor* v. *Marine and Fire Ins. Co.* 9 How. 390.

It will, upon undertaking the administration of the assets, enjoin law proceedings, and settle the whole estate, in a case like that at bar, upon the maxim that equality is equity. 2 Joyce on Injunctions, 1048, 1056; Kerr on Injunctions, secs. 103, 107, 108; *Rankin, Receiver,* v. *Elliott,* 14 How. 345.

At law, those who sue first must recover the whole of their debt, which would be palpably unjust. This, of all cases which can arise, seems to call most loudly for chancery jurisdiction. *Harris* v. *First Parish,* 23 Pick. 113; Thompson on Liability of Stockholders, sec. 275; *Crease* v. *Babcock,* 10 Metc. 525; *Coleman* v. *White,* 14 Wis. 700.

When proceedings are instituted by part of the creditors of an insolvent corporation against the stockholders, to enforce their individual liabilities for the benefit of all the creditors, no creditor can acquire priority, or commence a separate suit to enforce such liability in his own behalf. *Wright* v. *McCormack,* 17 Ohio St. 86.

The principle that equality is equity should apply in such a case. *Briggs* v. *Penmann,* 8 Cow. 392; *Bank* v. *Ibbotson,* 24 Wend. 473; *Smith* v. *Huckabee,* 53 Ala. 191; *Weeks* v. *Love,* 50 N. Y. 571; *In re Empire City Bank,* 18 id. 199.

The Supreme Court of the United States holds that under a similar charter all creditors of the corporation are entitled to share alike in the proceeds of the litigation. *Carroll* v. *Green,* 2 Otto, 509; *Horner* v. *Henning,* 3 id. 228.

Messrs. SHUFELDT & WESTOVER, for the appellees:

The decree in the injunction suits merely ordered the money to be paid into court, leaving the question of its distribution an open one. It contained no direction as to whom this money should be paid.

The nature of the liability of the stockholders, in the absence of a directory statute, controls the remedy and fixes the rights of the litigants. This court has settled the law that the remedy is at law. *McCarthy* v. *Lavasche*, 89 Ill. 270; *Fuller* v. *Ledden*, 87 id. 310; *Hull* v. *Burtis*, 90 id. 213; *Wincock* v. *Turpin*, 96 id. 135.

The appellees having brought actions at law against Munger and Hatch to recover upon an obligation which the law would thus enforce, acquired rights thereby which a third party could not defeat by a subsequent action.

If another creditor can take away the plaintiff's right of recovery, and appropriate the plaintiff's victory largely to himself, why can not the stockholder, the defendant, voluntarily pay another creditor, and thus defeat a suit pending against him?

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

Much confusion exists in the record on account of the introduction of matter wholly irrelevant to the present appeal. The abstract was found to be of little use in ascertaining what the present litigation concerns. Resort has been had to the transcript, and it is seen the appeal brings before this court nothing but the proceedings had on the petition of Joseph G. Hall and others, filed in the consolidated causes of *Cunningham et al.* v. *The Bank of Chicago*, and *Jacobson et al.* v. *Piper et al.*, originally commenced in the Superior Court, on the chancery side of the court. *Thrifts* v. *Fritz*, 101 Ill. 457; *Smith* v. *Brittenham*, 94 id. 624; *Smith* v. *Brittenham*, 88 id. 291.

The petition on which the order appealed from was made, states with sufficient clearness that long before the suit in chancery was begun, petitioners commenced separate actions at law against Munger and Hatch, to recover upon their individual liability as stockholders therein the several amounts due each of them from the Bank of Chicago; that by the

decree of April 2, 1879, petitioners were enjoined from further prosecuting their suits, final judgments therein being prevented by the proceedings in chancery; that Munger and Hatch had paid into court, under the decree in the consolidated causes in chancery, the amounts of their liability, as fixed by such decree, the aggregate amount being a sum in excess of $40,000; that the sums so paid by such stockholders were not sufficient to discharge the claims of petitioners represented in their suits at law; that by the commencement and prosecution of such suits at law to recover from Munger and Hatch the amount of their liability, petitioners acquired a prior right to the fund in court to any other creditors not suing, in the order in which they had begun their several suits. Petitioners further stated the order in which their respective suits were begun, the amounts of their individual claims, and prayed that the same be paid and satisfied from the money paid into court by Munger and Hatch, so far as it would satisfy them. And petitioners further stated, should such fund be distributed to the creditors of the bank generally, without regard to priorities, or suits having been commenced, then, of the $40,000 so paid into court by Munger and Hatch, $6000 would belong to the complainants in the consolidated chancery causes, and who are the same parties prosecuting this appeal, and $34,000 would belong to petitioners, there being no other creditors of the bank.

This brief statement contains the substance of all the facts alleged in the petition,—certainly all that are material to an understanding of the case; and to the petition stating these facts, with others more at length, the receiver of the bank and other complainants in the original bill interposed a demurrer, which was by the court overruled, and the demurrants electing to stand by their demurrer, the court decreed substantially according to the prayer of the petition, and directed that all the money paid into court under its former decree by Munger and Hatch, being a sum in excess of

$40,000, should be paid to Shufeldt & Westover, solicitors for petitioners, less the sum of $4000 decreed to be paid to E. G. & A. B. Mason, solicitors for Jacobson, for such receiver's costs, charges and counsel fees. On the appeal of the complainants in the consolidated causes, this decree of the Superior Court was affirmed in the Appellate Court for the First District, and the same parties bring the case to this court on appeal.

A stipulation purporting to be signed by the respective counsel conducting this case, is copied into the transcript filed in the cause. It is entitled in the consolidated causes of *Cunningham et al.* v. *The Bank of Chicago*, and *Jacobson, Receiver*, v. *Piper et al.*, and is as follows: "It is stipulated and agreed that after the entry of the decree of February 2, 1878, herein, an appeal was taken by Isaac P. Coates, assignee, to the Supreme Court, which appeal was disposed of by said court by an affirmance of said decree, February 22, 1879; that after the entry of the decree of April 21, 1879, two appeals were prosecuted from it,—one by the stockholders Munger and Hatch, and one by all the creditors of the bank who had sued Munger and Hatch at law, viz., Piper and others; that in both appeals the decrees were affirmed by the Appellate Court; that appeals were prosecuted by both sets of appellants to the Supreme Court; that the appeal of Piper and others was dismissed in said court, and the appeal of Munger and Hatch was decided by an affirmance of the decree below as to said appellants, Munger and Hatch, and the consolidated cause was properly brought before the Superior Court again in June, A. D. 1881, by filing the proper *procedendo* and order of affirmance." The clerk, in making up the transcript of the record filed in this case, states this "stipulation is among the files in this cause," but it is not made a part of the record in any manner known to the practice in such cases, and whether it was used on the hearing of this cause in the Superior Court does not appear.

It is apparent the only question that can arise on the present appeal is, whether petitioners are entitled to the relief decreed to them. That question arises on the demurrer to their petition, and is not otherwise presented. Unless the petition itself states a case that would entitle the parties asking it, no relief ought to have been granted to them. Recurring again to the allegations of the petition as previously stated, it will be seen petitioners base the right to have their claims against the insolvent bank first paid out of the fund under the control of the court to the exclusion of other creditors, upon the fact that "by reason of having first brought actions at law against said Munger and Hatch to recover the said liability of the said Munger and Hatch in satisfaction of the claims of your petitioners against said corporation, they acquired a right of priority in said liability, and in and to the funds paid into this court by said Munger and Hatch, to discharge their said liability." The court, by its decree, found, as a matter of fact, the allegations of the petition were true, as stated; that petitioners were creditors, in the several sums stated, of the Bank of Chicago; that long before the chancery suits in which their petition was filed were commenced, petitioners had commenced separate actions at law against Munger and Hatch on their respective claims, on their liability as stockholders in such bank, and that the sum paid into court by Munger and Hatch in discharge of their liability as such stockholders, was insufficient to pay in full all the creditors of the bank, and as a matter of law the court found that petitioners, "by reason of their having commenced their said suits at law prior to the said chancery proceedings, and diligently prosecuted the same until stayed by order of this court, acquired and obtained and now have first lien upon the said fund now in court, which should be enforced in their favor," and thereupon the court decreed accordingly.

The findings of facts by the court are of course correct, as they appear by admission on demurrer, but the error in the

decree consists in finding, as a matter of law, that petitioners had a prior lien on the funds under the control of the court by reason of being first to commence actions at law against certain stockholders on their liability as such, to enforce payment of their claims against the failing bank. Such is not the law. Whether the liability of the stockholders under the charter of the Bank of Chicago could be enforced at law or only in chancery, is a question that does not and can not arise in this case as it now comes before this court, and no discussion of that branch of the case will be entered upon. The ground of liability, as set forth in the petition, is, that petitioners, by reason of having first commenced suits at law against stockholders on their liability, under the charter of the debtor bank, before other creditors instituted any suits at law or in chancery, acquired a prior lien on that liability, and to the funds paid into court under its decree to discharge such liability, which they have a right to have enforced in their favor to the exclusion of other creditors. It is not alleged, nor is it true, that petitioners ever recovered any judgments at law against such stockholders. It is stated, however, they were prevented from so doing by the restraining order of the court. On what principle the claim insisted upon rests, is not understood. Under the laws of this State the mere institution of a suit does not create a lien on anything. It is the final judgment or decree that creates a lien. It is a matter of no consequence, so far as the lien is concerned, what prevented petitioners from obtaining judgments at law for the indebtedness of the bank to them against its stockholders. It is an admitted fact, petitioners obtained no judgments at law against any stockholder of the bank, and without judgments no liens exist that could be enforced in their favor. It is for the reason there is no statute or other law that gives a lien in such cases. It would be to state a new doctrine to hold the mere institution of a suit at law by one creditor gave him a prior right or lien on the fund out of

which a class of creditors are to be paid, that would exclude all others from a participation therein until he should first be fully paid out of such fund. Such a rule would rest upon no principle of justice. It would have nothing reasonable in its support, and would be palpably unjust.

The fund mentioned in the petition is now in a court of equity, under its decree, which, if the stipulation found in this record is to be regarded, has been affirmed by a court of last resort, and must therefore stand forever as conclusive of the rights of all persons affected by it, and such fund must be further administered by the court on principles of equity and equal justice. Nothing is shown by the petition herein that would give the petitioning creditors any prior claim upon the fund in court over other creditors of the bank entitled to participate in it.

The judgment of the Appellate Court will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

Mr. JUSTICE WALKER: I dissent to the conclusion reached by the court in this case.

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ESTHER E. TAYLOR

v.

SIMON REID *et al.*

Filed at Ottawa June 21, 1882.

1. SALE UNDER TRUST DEED—*of the notice of sale—effect of making publication in advance of the time required.* Where a deed of trust requires thirty days' notice to be given previous to a sale, by publication once in each week for four successive weeks, a notice of the sale published the first time a few days more than thirty days prior to the sale, and continued in three other issues of the paper, weekly, is not invalid, but is a

substantial compliance with the power. It may be that a notice in such a case published a great length of time before the sale, would be no notice at all, though within the letter of the power.

2. SAME—*of notice under statute—as to the first and last days of publication.* The provision of the statute relating to sales under powers in mortgages and deeds of trust, requiring at least thirty days' previous notice of a sale to be given, whether so specified in the power or not, and that such notice shall be given by publication, once in each week for four successive weeks, in some newspaper, etc., does not require that the last publication shall be at least thirty days before the sale, but it is sufficient that the first publication shall be at least thirty days before the sale, and the publication shall be continuous, as nearly as possible, in weekly newspapers, for thirty days prior to the sale.

3. SAME—*and herein, of the evidence of the publication of notice of sale.* A certificate of the publisher of a weekly newspaper, that the notice of the sale of land under a trust deed, of which an annexed slip is a true copy, was published for four successive weeks, to-wit: four times in the "Chicago Legal News," a weekly secular newspaper, published every Saturday in, etc., and that the date of the first paper containing the same was the 9th day of November, A. D. 1878, and that the date of the last paper containing the same was the 30th day of November, 1878, the sale being advertised to take place on December 10, 1878, is a substantial compliance with the statute relating to such notices, and is sufficient evidence of the publication of the notice of the sale, which is required to be made on thirty days' prior notice, by publication for four successive weeks.

4. SAME—*publication of notice in advertising pages of "Chicago Legal News."* A notice of sale under a trust deed was given on sheets of advertisements attached to the "Chicago Legal News," which sheets or pages were headed "Chicago Legal News," and were of the same size as the other pages of the paper, and folded and sent out to subscribers with and as a part of the "Legal News." The pages containing law or miscellaneous reading were numbered consecutively both at the top and bottom of the page, but the pages containing advertisements were numbered consecutively with the other pages at the bottom only, and in this respect, and in the fact that the entire page is filled with advertisements only, did these pages differ from the others: *Held*, that the pages of the paper containing legal notices were as much a part of the "Legal News" as any other part of the pages of that publication, and proof of these facts did not impair the evidence of due publication afforded by the publisher's certificate.

5. SAME—*when retention of notes does not invalidate sale.* Where a sale is made of lots under a power in a deed of trust to the party holding the notes secured, and the amount of the sales credited on the notes, their retention by the payees, not as subsisting liabilities, but simply as a muniment of title, will not invalidate the sale, or give the former owner, the debtor, the right to redeem from the sale.

Statement of the case.

APPEAL from the Circuit Court of Cook county; the Hon. M. F. TULEY, Judge, presiding.

Bill was filed in the Circuit Court of Cook county, on the 23d of March, 1881, by Esther E. Taylor, against Simon Reid, Thomas Murdoch, Frederick Fischer, Anton Christianson Berg, and George S. Bullock, to redeem lots 2 and 4, in block 20, of Duncan's addition to Chicago, from a sale made under a deed of trust.

It is alleged in the bill that on the 27th of October, A. D. 1875, the complainant, with her husband, Douglas S. Taylor, borrowed of said Reid, Murdoch & Fischer, partners in business in Chicago under the firm name of "Reid, Murdoch & Fischer," the sum of $10,500, for which they gave their promissory note, payable three years after date, with interest at the rate of ten per cent per annum, payable semi-annually; that to secure the payment of such promissory note the complainant, together with her husband, conveyed lots 2 and 4, in block 20, in Duncan's addition to Chicago, in trust to L. C. Paine Freer, with power in him, in case of default, etc., on the application of the legal holder of said promissory note, after having given thirty days' previous notice, by publication once in each week, for four successive weeks, in the "Chicago Legal News," or some other newspaper at the time of sale published in the city of Chicago, to sell the said premises at a time specified in such notice, at the south-east corner of Adams and La Salle streets, in the city of Chicago, at public auction, to the highest bidder, for cash, etc.; that on or about the 1st of November, 1878, the said principal sum of $10,500 being due, and the interest thereon, amounting to $525 due April 27, 1878, and $525 due October 27, 1878, being unpaid, said firm of Reid, Murdoch & Fischer, being the holder of such note and of notes given for such interest, caused to be prepared and published a notice signed by said Freer, as such trustee, that on the 10th day of December,

Statement of the case.

A. D. 1878, at the hour specified in said notice, at the south-east corner of La Salle and Adams streets, he would sell the said premises under and by virtue of such power, and for the purposes aforesaid; that afterwards, and before the 10th of December, 1878, complainant applied to said Reid, Murdoch & Fischer, to desist from such sale, and to allow complainant forbearance on the said debt, and said Reid, Murdoch & Fischer assured complainant that the sale would not make any difference, for all they wanted was their money, and they would take that at any time, after sale as well as before—that there would be no bidders at the sale advertised, and they would have said lands struck off and conveyed to themselves, and would thereafter hold the same, as before, as security for said debt, and would at any time accept said debt and interest, and that it would not make any difference about such sale—complainant could redeem the property after the sale just as well as before. It is further alleged that complainant, relying on and being thrown off her guard by such assurances, did not sacrifice other property to raise money, as she could have done, to redeem said lots before the time fixed for such sale, nor did she attempt to procure bidders to bid at such sale and buy said lands for their value, though said lands were worth much more than the said sum secured thereon. And it is further alleged that said sale coming on, there were no bidders, but said Reid, Murdoch & Fischer caused said lots to be entered as sold to Thomas Murdoch, one of the members of said firm, for $5919 each, and caused said Freer to execute a deed for the same to him, etc.

It is charged that the notice was not published, as recited in the trustee's deed to Murdoch, for four successive weeks in the "Chicago Legal News," but for at least two of said weeks it was not published in said "Legal News," nor in any other newspaper; that the holder of said notes had no authority or right to become a purchaser at a sale made under and by virtue of the powers aforesaid; that on or about the 2d day

of October, A. D. 1879, Reid, Murdoch & Fischer pretended to sell and convey unto Anton Christianson Berg the north half of said lot 4, by warranty deed, for the consideration of $3750, and, on the same day, they also pretended to sell and convey unto George Bullock the south half of said lot, for a like consideration of $3750; and it is also further charged that each of the defendants has acknowledged the right of the complainant to redeem said premises until within the then last sixty days. The prayer of the bill is, that the complainant be let in to redeem.

The answers admit the borrowing of the money, execution of note and deed of trust, sale under deed of trust, execution of deed of trustee, and sale and conveyance to Berg and Bullock, as alleged, but deny that there was ever any agreement that complainant be allowed to redeem, that the notice was insufficient, but, on the contrary, allege and claim that the sale was, in all respects, regular and legal. The material allegations are all put in issue, and the defendants set up and rely, also, upon the *laches* of the complainant in prosecuting her suit.

On hearing, the court below decreed that the bill be dismissed. From that decree complainant appeals to this court, and assigns for error—

First—The Circuit Court erred in dismissing said bill.

Second—The court rejected evidence offered by plaintiff that ought to have been received.

Third—The court received evidence offered by defendant that ought to have been rejected.

Fourth—The court ought to have granted to the plaintiff relief according to the prayer of her bill.

Mr. EDWARD ROBY, for the appellant:

The notice, if published as recited in the trustee's deed, was insufficient. The trustee's deed was void for defect of power, and this appears in the deed itself.

Brief for the Appellees.

The trust deed required thirty days' prior notice of the sale, while the notice was for more than thirty days before. Power to sell on thirty days' notice can not be exercised on sixty or ninety days' or a year's notice. *Stine* v. *Wilkeson*, 10 Mo. 96; *Kellogg* v. *Garrico*, 47 id. 159.

Power to sell on thirty days' notice, by publication in a newspaper, requires a publication in every issue of the paper for that period. *Stine* v. *Wilkeson*, 10 Mo. 96; *Armstrong* v. *Scott*, 4 G. Greene, 433.

The statute (Rev. Stat. chap 95, sec. 14,) requires at least thirty days' previous notice of such sales by publication in four weekly issues of some newspaper. This notice was not given until the publication was complete. *Burton* v. *Chicago*, 53 Ill. 87; *Chicago* v. *Vulcan Iron Works*, 93 id. 222.

The provision of the statute is not that the trustee shall begin to give the notice thirty days before sale. It means that the four weeks' publication must be completed before the sale. As to when notice is complete, see *Thormeyer* v. *Sisson*, 83 Ill. 188; *Scammon* v. *Chicago*, 40 id. 146; *Randall* v. *Sanger*, 16 id. 27; *Haywood* v. *McCrary*, 33 id. 459; *Vairin* v. *Edmonson*, 5 Gilm. 270.

No *laches* can be imputed because her notes were kept outstanding, and the keeping of such notes against appellant is evidence that the debt is still outstanding, and the title, though absolute on its face, is still in mortgage. *Enner* v. *Thompson*, 46 Ill. 223; *Sutphen* v. *Cushman*, 35 id. 196.

Mr. FRANK J. CRAWFORD, for the appellees:

Appellant's counsel assumes two propositions: first, that the notice was given too long before the sale; and second, that the notice was not given long enough before the sale. The first is based upon the provisions in the deed of trust, and the second on the statute.

The authorities cited have no application here, as, if the trust deed was made prior to the time the statute was in

force, July 1, 1874, and had simply required twenty days' notice, one notice published twenty days previous to the sale would have been sufficient. *Wild et al.* v. *Rees*, 48 Ill. 428; *Cushman* v. *Stone et al.* 69 id. 520; *St. Joseph's Manf. Co.* v. *Daggett*, 84 id. 559.

A longer notice than is required, by a few days, can work no injury, but is calculated to work to the debtor's benefit. *Tooke et al.* v. *Newman et al.* 75 Ill. 219; *Beal* v. *Blair et al.* 33 Iowa, 313. See, also, *Atkinson* v. *Duffy*, 16 Minn. 48.

When a statute requires three weeks' notice to be given before court, it does not require that three weeks shall intervene between the third publication and the session of the court. *Fry* v. *Bidwell*, 74 Ill. 381.

The publisher's certificate, which in all respects conformed to the requirements of the law, sufficiently proved that the notice was duly published. That, under the statute, was sufficient evidence thereof. Rev. Stat. chap. 100, sec. 1.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The first objection taken by counsel, in argument, to the decree below, is, "the notice, if published as recited in the trustee's deed, was insufficient; the trustee's deed was consequently void for defect of power, and this appears in the deed itself."

The proof of the notice published, as recited in the decree, was, that "on the 9th day of November, A. D. 1878, the trustee caused due notice to be published in the 'Chicago Legal News,' a newspaper published in the said city of Chicago, that said premises hereinafter described would, on the 10th day of December, A. D. 1878, at the hour of 10 o'clock in the forenoon of said day, be sold at public auction, at the south-east corner of Adams and La Salle streets, in said city of Chicago, in said county of Cook, to the highest bidder, for cash, by virtue of the power and authority in him vested by said trust deed, which said notice was duly published once a

week for four successive weeks, to-wit: four times in the said 'Chicago Legal News,' and that the date of the first paper containing the same was the 9th day of November, A. D. 1878, and of the last the 30th day of November, A. D. 1878," etc. The power in the deed of trust required that the premises should be sold at public auction, for the highest and best price, etc., "thirty days' previous notice of such sale having been given, by publication, once in each week for four successive weeks, in the 'Chicago Legal News,' or in any newspaper at that time published in Chicago."

The first ground of objection discussed is, under this power no latitude is given the trustee,—the notice must be published precisely thirty days before the day of sale. This is not tenable. The power does not require that the notice shall be published, for the first time, thirty days previous to the day of sale, but simply that there shall be thirty days' previous notice, etc. It may be conceded that the publication of a notice a great length of time before the day of sale, although strictly within the letter would not be within the spirit of the power, and would be no notice in fact; but that case is not now before us. The sale here was on the 10th of December, and the last publication on the 30th of November,—a reasonable time enough for all purposes of notice.

In *Tooke et ux.* v. *Newman et al.* 75 Ill. 219, to a like objection there urged, it was replied: "The claim that the notice is insufficient is extremely technical, and without force or merit. The deed of trust required that there should be published a notice of sale for five consecutive days, the last of which should be ten days before that fixed for the sale. The deed does not state the last insertion of the notice shall be ten days, and no more, before the sale. Had there been but nine days, then it would have been insufficient, because the longer the notice, within reasonable limits, the greater the number of persons who will see it, and the larger the chances

for an enhanced price that may be had for the property. Hence the law gives to the debtor the full benefit of the stipulated notice, and prevents the creditor from abridging the time, and thus injuring his debtor. But a longer notice than is required, by a few days, can work no injury, but is calculated to operate to his benefit." In principle that case and the present, in respect of the point under consideration, are entirely analogous.

In *Beal* v. *Blair et al.* 33 Iowa, 318, where it was provided sale might be made upon giving thirty days' notice thereof, it was held the time of sale was not limited thereby to the day immediately succeeding the expiration of the thirty days.

We have carefully examined the cases referred to by counsel for appellant, and we deem them inapplicable. The *dictum* in *Armstrong* v. *Scott*, 3 G. Greene, 433, relied upon, was subsequently overruled by the same court in *Lefler* v. *Armstrong*, 4 Iowa, 487.

The next ground of objection urged is this: It is provided by section 14, chap. 95, Rev. Stat. 1874, that "in all sales of real estate under a mortgage, or trust deed in the nature of a mortgage, executed after the taking effect of this act, which may be made pursuant to a power of sale, at least thirty days' previous notice of such intended sale shall be given, whether so specified in the power of sale or not. * * * The notice shall be given by publication, once in each week for four successive weeks, in some newspaper or other paper authorized by law to publish legal notices, published in the county or counties where the premises are situated, or if no paper is published in such county, the nearest newspaper published in this State; but in no case shall a notice be given for a shorter time than is required by the mortgage or deed of trust," and the contention is, this requires that the last publication shall be at least thirty days before the sale. But this, in our opinion, is neither in accordance with the letter nor the spirit of the statute. "At least thirty days'

previous notice shall be given," says the statute, and this is fully answered by one publication—the first—at least thirty days before the sale. This ends the direction as to *when* the notice shall be published, and then follows the direction *how long* it shall be published, namely, "once in each week, for four successive weeks." Thus there is required a continuous publication, as nearly as is possible by weekly newspapers, for thirty days prior to the sale. Had it been designed the last publication must be at least thirty days prior to the sale, we must presume it would have been so enacted, and as it was not so enacted it can not be held to be the law. *Fry* v. *Bidwell*, 74 Ill. 381.

The next point urged is, that there was in fact no publication as recited in the decree. It is provided by sec. 1, chap. 100, Rev. Stat. 1874, "that when any notice shall be required by law, or the order of the court, or any contract, to be published in any newspaper, and no other mode of proving the same is provided, the certificate of the publisher, * * * with a written or printed copy of the notice annexed, stating the number of times which the same shall have been published, and the dates of the first and last papers containing the same, shall be sufficient evidence of the publication therein set forth." Accompanying and annexed to the notice here, is a certificate of the publisher of the "Chicago Legal News" that the notice, "of which the annexed printed slip is a true copy, was published for four successive weeks, to-wit, four times in the 'Chicago Legal News,' a weekly secular newspaper, published every Saturday in the city of Chicago, county of Cook, and State of Illinois, * * * and that the date of the first paper containing the same was the 9th day of November, A. D. 1878, and that the date of the last paper containing the same was the 30th day of November, 1878." This we regard as a full compliance with the section of the statute quoted, and a complete protection to third parties acquiring rights under the sale; but since, as to one lot,

the *cestuis que trust* under the deed of trust are claimants, it is, perhaps, necessary to go farther, and inquire whether appellant has successfully impeached this certificate.

Appellant claims to have impeached the certificate by proof that the pages on which the notice was published were not, in fact, a part of the "Legal News," though folded with and circulated with it. The substance of the proof is, a large number of advertisements are published in the "Legal News," and upon some of the pages on which this notice was published there was nothing but advertisements. These pages were, as the others, however, headed "Chicago Legal News;" they were of the same size as the other pages, and folded and sent out to subscribers with and as a part of the "Legal News." The pages containing law or miscellaneous reading are numbered consecutively, both at the top and the bottom of the page, but the pages containing nothing but advertisements are numbered consecutively with the other pages at the bottom of the page only, and in this respect, and in the fact that the entire page is filled with advertisements, do these pages differ from the others. We can not think the omission of the paging at the top a circumstance of any importance. It in nowise affects the question of notice, and is a mere matter of convenience in making reference, which is as effectually promoted by the paging at the bottom. The law does not require, nor does the deed of trust require, the notice shall be published on a page containing law reading or miscellaneous reading. The pages containing legal notices seem to us to be just as much a part of the "Legal News" as any other of the pages of that publication. We do not think the certificate is at all impaired by the evidence.

Another objection urged by counsel for appellant against the decree below is, there was "no auction, no bidding." This is not sustained by the evidence. Freer, the trustee, testifies that he offered the property for sale at public auction; that one of the lots was first bid off by a gentleman

whose name he does not recall, and the other was then bid off by Murdoch; that the gentleman bidding off the first lot claimed to have been laboring under a mistake, and in consequence refused to take the lot. He then says: "It is my impression * * * that I went on then and re-offered the first piece of property." And he subsequently states that "Murdoch became the purchaser of it also." We do not think Freer's evidence on this point successfully contradicted.

The objection that no money was paid by Murdoch at the time of the sale, is untenable. It was sufficient that the amount bid was credited upon the note. *Jacobs* v. *Turpin*, 83 Ill. 424.

Steumbaugh v. *Hallam*, 48 Ill. 305, *Sutphen* v. *Cushman et al.* 35 id. 186, and *Ennor* v. *Thompson*, 46 id. 214, referred to by counsel for appellant, are not in point. In those cases the notes were held by the payees as subsisting evidence of indebtedness, while here they are retained simply as muniments of a title derived by virtue of a sale resulting in their satisfaction. Doubtless, being satisfied, the maker is entitled to their possession. (*In re Costar*, 2 Johns. Ch. 503.) But their possession by the payees, under the circumstances here proved, does not rebut the idea that there was a sale of the property under the power in the deed of trust.

But counsel insist, as a final and conclusive objection to the decree below, that the equities are such as to preserve the right of redemption, notwithstanding the sale, and, under this head, they contend there was an agreement between appellant and Murdoch, Reid & Fischer, whereby they agreed she should be allowed to redeem, notwithstanding the sale. Appellant testified: "On learning that the property * * * had been advertised for sale, for foreclosure, Col. Roberts went with me immediately to see Messrs. Reid, Murdoch & Fischer. We saw Mr. Murdoch and one other gentleman, I don't know whether it was Mr. Reid or Mr. Fischer, and asked them to give me a little more time, as it was the first

I had heard of it, and they told me if I would bring them the amount of the interest then due they would withdraw, and I could make a new loan at a lower rate of interest; but I told them the time was so short, it was too short then for me to raise the money. It was then the 7th or 8th, and the sale was the 10th of December. They told me that the sale then would have to go on, but that I could redeem the property at any time. Mr. Murdoch stated to me that the sale would have to go on, but that I could redeem the property. * * * After he stated to me that I could redeem the property at any time, I left then, feeling very easy, and never thought any more about it for some time." She shows that at this time she had with her her attorney, R. Biddle Roberts, who heard the whole conversation, and his recollection fails to sustain her. Among other things he testified: "They (*i. e.*, Murdoch, Reid & Fischer,) stated that they only wanted to get back their loan. I think that Mr. Reid said that the money was not theirs; that they were only acting for other parties, and that they must get back the loan. Mrs. Taylor was unable to give them a distinct assurance as to when she would make a payment, and we parted, as I recollect, they agreeing to postpone the sale if certain payments were made, and stating that all they wanted was their money." On cross-examination he says this payment was to be made at some time prior to the time the sale was to take place.

The husband of appellant corroborates her, in his testimony, to some extent. He testifies, that after the sale was made Murdoch told him that he (Murdoch) would be very glad to take the money at any time; that he was loaning money; wanted his money and interest, and not property. But this is emphatically denied by Murdoch, and he also denies that any agreement was made whereby appellant should be allowed to redeem after the sale. His testimony is fully corroborated by that of Reid. They admit they agreed

to postpone the sale if the interest due should be paid before the day fixed for the sale, but deny that any right of redemption after the sale was recognized.

We can not say the court below erred in finding the alleged agreement to allow redemption after the sale not proved by the evidence. If such an agreement had been made, it would have been strange indeed if it had no limitations, and yet appellant's testimony fixes no time within which redemption was to have been effected. It does not, from her testimony, appear that she undertook to redeem at all. She was simply allowed the privilege to do so, indefinitely. Such an agreement, if made, would have been void for want of mutuality. It is most singular that business men should enter into such an agreement. Why have a sale, if no title could pass?

Some minor objections are urged, which we deem untenable, and not of sufficient importance to specifically notice.

On the whole, we are unable to say there is such error in the record as would warrant us in reversing the decree below. It will, therefore, be affirmed.

Decree affirmed.

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BERNHARD KIHLHOLZ

v.

FREDERICKE WOLF, EXRX.

Filed at Ottawa June 21, 1882.

1. USURY—*burden of proof lies on party alleging usury.* The burden of proving a transaction usurious, rests upon the party alleging it. The usury must be established by a preponderance of evidence, or else the defence fails.

2. SAME—*what constitutes usury—as to commissions paid to party obtaining loan.* Where the lender of money at the request of the borrower pays out of the money loaned commissions and other expenses of third persons, as agents of the borrower in procuring the loan, being of no benefit to

the lender, this will not render the transaction usurious. It has been held otherwise where the commissions paid the agent inured directly to the benefit of the lender.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

Messrs. DENT & BLACK, and Mr. MARSHALL BECK, for the appellant:

A loan of money, when the lender retains a part of the sum loaned to pay an agent procuring the loan a bonus or commission, above the legal rate of interest, is usurious, although the lender retains only a legal discount. *Meagoe* v. *Simmons*, 1 Moody & Malkin, 121; *Condit* v. *Baldwin*, 21 N. Y. 219; *Bank of the United States* v. *Owens*, 2 Pet. 536; *Hine* v. *Handy*, 1 Johns. Ch. 7; *Gates* v. *Hack et al.* 57 Ill. 587; *Reinback* v. *Crabtree*, 77 id. 182; *Meiswinkle* v. *Jung*, 30 Wis. 361; *Kendig* v. *Linn*, 47 Iowa, 62; *Payne* v. *Newcomb*, 100 Ill. 611.

The rule in this court is, that usury paid with the principal can not be recovered back, but so long as any portion of the principal remains, out of or in connection with which the usurious interest accrued, it may be deducted from or set off against such principal. *Hawhe* v. *Snydecker*, 86 Ill. 197; *Mitchell* v. *Lyman*, 97 id. 525; *Peddicord* v. *Connard*, 85 id. 102; *Jenkins* v. *Greenebaum*, 95 id. 11; *House* v. *Davis*, 60 id. 367; *Haddin* v. *Inness*, 24 id. 381; *Farwell* v. *Meyer*, 35 id. 41; *Saylor* v. *Daniels*, 37 id. 331; *Jenkins* v. *International Bank*, 97 id. 568; *Driscoll* v. *Tannock*, 76 id. 154.

Mr. W. D. BISHOP, and Mr. T. MORRISON, for the appellee:

A party may take from the borrower a reasonable compensation in excess of interest for services and expenditures in procuring the money to be loaned, where there is no intent to evade the law, provided the services were performed and

the expenses incurred at the request of the borrower, and upon his express promise to pay therefor. *Thurston* v. *Cornell*, 38 N. Y. 281; *Shirley* v. *Spencer*, 4 Gilm. 583; *Eaton* v. *Alger*, 2 Abbott's App. Decis. (N. Y.) 5; *Eaton* v. *Alger*, 2 Keyes, (N. Y.) 41; *Eldridge* v. *Reed*, 2 Sweeney, (N. Y.) 155; *Beadle* v. *Munson*, 30 Conn. 175; *Harger* v. *McCullough*, 2 Denio, 119; *Atlanta et al.* v. *Gage*, 48 Ga. 11; *First Nat. Bank of Martinsville* v. *Caustey*, 34 Ind. 149; *Brown* v. *Harrison*, 17 Ala. 774; 3 Parsons on Contracts, 133, sec. 9; Tyler on Usury, 130–141; *Shirley* v. *Spencer*, 4 Gilm. 583.

This principle seems equally settled in England. *Haynes* v. *Fry*, 15 Vesey, 120; *Palmer* v. *Bohee*, 1 Maule & Selwyn, 56; *Burden* v. *Parry*, 2 Term R. 52. See, also, *Puterbaugh* v. *Farrell*, 73 Ill. 213; *Boyleston et al.* v. *Bayne*, 90 id. 283; *Condit* v. *Baldwin*, 21 N. Y. 219.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

The bill in this case was brought by Henry Wolf, since deceased, against Bernhard Kihlholz, to foreclose two deeds of trust,—one given by defendant to John Buchler, and the other to Otto Wolf,—to secure the sums of money evidenced by the promissory notes described in the trust deeds. Since the death of Henry Wolf the suit has progressed in the name of Fredericke Wolf, executrix of his estate. The defence attempted to be made is, that usury was reserved in the making of both loans. The cross-bill filed by defendant having been dismissed, nothing remained to be considered except the question made whether the transactions were usurious or not. The cause was referred to the master in chancery, to take testimony and report his conclusions. Touching the vital question made by the pleadings, the evidence consists mainly of testimony given by the parties in interest. Some testimony of disinterested witnesses was taken, but it was so remote to the real issue as not to be of a conclusive

character. It can not be said it strengthens in any considerable degree the testimony of either party. The report made by the master in chancery presents a very clear and satisfactory analysis of the testimony, and may be regarded as in the main entirely accurate. The Superior Court found by its decree there was no usury in either transaction, and entered a decree of foreclosure for the amount ascertained to be owing to complainant. That decree, on defendant's appeal to the Appellate Court for the First District, was reversed, because "the direction in the decree as to defendant's surrendering possession to the purchaser upon the latter obtaining the master's certificate of purchase, was in contravention of law," but concerning the finding of the Superior Court upon the question of usury, it was the opinion of the Appellate Court it was not erroneous. On the remandment of the cause a second decree was entered by the Superior Court conforming to the views expressed by the Appellate Court, which latter decree, on defendant's appeal, was affirmed in the Appellate Court, and now he brings the case to this court on appeal.

The question whether the transactions between the parties were usurious, has been again elaborately argued, and the case has been considered with that care its importance demands. As before remarked, the evidence touching the issue as to the usurious character of the transactions consists chiefly of that given by the parties themselves. On every material point it is flatly contradictory, and it may be justly said the testimony of neither party finds any considerable support in the testimony of other witnesses. Considering the same question, the Appellate Court, by its then presiding judge, very correctly remarked: "The evidence is so conflicting we can not say there was a preponderance in favor of appellant." (8 Bradw. 371.) No reason is perceived for departing from the conclusion reached by the Appellate Court in that respect. It would answer no good purpose to enter again upon an analysis

of the testimony. That work has been done by the master to whom the cause was referred. It is sufficient for this court to say, that after a patient consideration of the testimony in the record, it is not perceived it was proven by any preponderance of the testimony that either transaction between the parties was usurious. The law is, the burden of proving a transaction usurious rests on the party alleging it. This he must do by a preponderance of evidence, or else the defence fails. That has not been done in this case. Should the testimony of the original complainant be credited, as the trial court was warranted in doing, it does not appear he received anything above the legal rate of interest on the loans made to defendant. That which was paid as commissions and other expenses was paid by decedent to other persons at defendant's request. The payments made to third persons to secure the loans were not of the slightest benefit to him. They were made for, and at the instance of, defendant. In this respect it is unlike the case of *Payne* v. *Newcomb*, 100 Ill. 611. In that case the commissions paid to the agent transacting the business inured directly to the benefit of the lender, and that was thought to render the loans usurious. A nearer affinity exists between this case and *Colehour* v. *State Savings Institution*, 90 Ill. 152, and the reasoning in that case may be referred to as supporting, in some degree at least, the conclusion reached in the case at bar.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Syllabus.

In the matter of the Petition of ALEXANDER FERRIER.

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Filed at Ottawa June 21, 1882.

1. INDUSTRIAL SCHOOLS—*act relating thereto is not unconstitutional, as being in restraint of personal liberty.* Section 3 of the act entitled "An act to aid industrial schools for girls," approved May 29, 1879, which provides for the committing to such a school of dependent infant girls who beg or receive alms while selling or pretending to sell any article in public, or who frequent any street, alley or other place for the purpose of begging, or who have no permanent place of abode, proper parental care or guardianship, or sufficient means of subsistence, or who for other cause are wanderers through the streets and alleys or other public places, or who live with or frequent the company of, or consort with, reputed thieves or other vicious persons, or who are found in a house of ill-fame or a poor house, is not unconstitutional, as being in violation of the Bill of Rights in respect to personal liberty.

2. Under such act due provision is made for the protection of all just rights, and the institution is not a prison, but a school; and the sending of a young female child there to be taken care of under a proper guardian to be appointed, who otherwise has no one to care for her, is not to be regarded as punishment. The restraint of liberty in such institution is no more than is found in any well regulated school. Such a degree of restraint as is essential to the proper education of a child, is in no just sense an infringement of the inherent and inalienable right to personal liberty.

3. The power conferred upon the county court under this act is but of the same character as the jurisdiction exercised by the courts of chancery over the persons and property of infants, having its foundation in the prerogative of the Crown, flowing from its general power and duty, as *parens patriæ*, to protect those who have no other lawful protector. Such an institution is but an agency of the State for the needful and proper control and care of female infants when found to be destitute of it.

4. SAME—*of the notice required of proceeding.* The statute provides merely that notice shall be given to the parents of such infant female. In this case written notice was served upon the mother, with a copy of the petition, on the day before the trial, and the step-father appeared. It was held there was notice in compliance with the statute, as opportunity was afforded to be present, and to apply for further time if not ready for the investigation.

5. JURY—*right to jury of twelve.* Under the act of 1879 relating to the industrial school, the party sought to be adjudged a dependent infant female is not entitled to a jury of twelve persons, the act only giving six jurors. That provision of the constitution that "the right of trial by jury as

Statement of the case.

heretofore enjoyed shall remain inviolate," does not apply in such a case, which is not a suit according to the course of the common law, but is purely a statutory proceeding, and under a statute enacted since the adoption of the constitution.

APPEAL from the County Court of Cook county; the Hon. MASON B. LOOMIS, Judge, presiding.

Appellee filed a petition in the county court of Cook county, under section 3 of "An act to aid industrial schools for girls," approved May 29, 1879. (Laws 1879, p. 309.) The petition set forth that Winifred Breen, the appellant, was a girl nine years old; had repeatedly been picked up by the police and others while wandering about the streets at night; was a truant from school, and had not proper parental care, and was in imminent danger of ruin and harm, etc.

Three witnesses testified as to the character and habits of the girl, Winifred Breen, stating that she was without proper parental care; that she wandered upon the streets of Chicago at all hours of the day and night; that she had been frequently picked up by the policemen of the city, late at night and miles away from her usual place of abode, and had been confined all night in police stations; that she kept bad company, and was in great danger of being ruined; that the mother of the child is weak-minded, and at times insane, having on one occasion attempted to hang Winifred; that she was unfit to have the control of the child, and incapable of managing her; that the step-father is poor and an invalid, earning only a small salary, and is compelled to be absent from his home the entire day, and he found it impossible to control the girl, and that she had been guilty of thefts and falsehood. The fourth witness, Mrs. Beveridge, stated that she was president of the Industrial School for Girls; that the school is situated in Evanston, in Cook county, on a five-acre tract of beautiful rolling ground, over which the inmates have free range as a play-ground; that there is no more restraint

upon their liberty than that imposed upon children in an ordinary family or institution of learning; that they are taught ordinary household duties, sewing, and the ordinary branches of English education; that parents are permitted to visit their children when they desire, and that children are given places in private families whenever suitable places can be procured, but not without their and their parents' consent. The girl herself testified that she sometimes ran away; that her mother tried to hang witness, and then tried to hang herself; that she was afraid of her mother; that she knew about this industrial school and wanted to go there. The father of the child, if still living, appears to have been a worthless character,—a professional thief,—who when last heard from, three years ago, was at the Bridewell, and the mother was divorced from him.

The jury returned a verdict that Winifred Breen was a dependent girl, and that the facts set forth in the petition were true, and thereupon the county judge entered an order that said Winifred should be committed to said Industrial School for Girls, and appointed Mrs. Ellen Woodward, one of the vice-presidents of the school, guardian of the child, in accordance with a provision of the act. The county attorney, whom the court had appointed counsel for the girl, and who appeared for her, took an appeal to this court.

Section 3 of the act under which this proceeding was taken, is as follows: "Any responsible person who has been a resident of any county in this State one year next preceding the time at which the petition is presented, may petition the county court of said county to inquire into the alleged dependency of any female infant then within the county, and every female infant who comes within the following descriptions shall be considered a dependent girl, viz: Every female infant who begs or receives alms while actually selling or pretending to sell any article in public, or who frequents any street, alley or other place for the purpose of begging or

receiving alms, or who, having no permanent place of abode, proper parental care or guardianship, or sufficient means of subsistence, or who for other cause is a wanderer through streets and alleys, and in other public places, or who lives with or frequents the company of, or consorts with, reputed thieves or other vicious persons, or who is found in a house of ill-fame, or in a poor house." The petition is to be verified by oath, and notice is to be given to the parents and guardian. The female infant is brought before the court, and if without counsel, it is made the duty of the court to assign counsel for her, and a trial is had before a jury of six. Section 2 declares: "The object of industrial schools for girls shall be to provide a home and proper training school for such girls as may be committed to their charge."

Mr. CONSIDER H. WILLETT, for the appellant.

Mr. JAMES K. EDSALL, and Mr. N. M. JONES, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

It is insisted that the law under which the proceeding was had is unconstitutional—first, as being in violation of the Bill of Rights as to personal liberty, in respect of the provision that no person shall be deprived of life, liberty or property without due process of law, and *The People* v. *Turner*, 55 Ill. 280, is relied upon as being a decisive authority in favor of appellant in this respect. That was an application by the father of a boy for a writ of *habeas corpus* to the superintendent of the "reform school" of Chicago, to free the boy from an alleged illegal restraint of his liberty, and it was held that the law providing for the commitment to that "reform school" was unconstitutional. That school was established under a statute different and much less careful in its provisions, and nearer in its approach to a criminal

enactment, than the one in question. The judge was the only one to decide in the matter. Criminals between six and sixteen years of age, convicted of crime punishable by fine or imprisonment, were confined there. That institution was regarded in that case as a place of confinement, and for punishment, and the commitment to it was regarded as imprisonment.

In the statute now under consideration, anxious provision is made for the due protection of all just rights. To begin, there must be the petition of a responsible person, verified by oath, setting forth the facts, and if there be a parent or a guardian, it must also show that the parent or guardian is not a fit person to have the custody of the infant, there must be notice to the parents, the child must be brought before the court, there is a trial as to the facts by six jurymen, defence by counsel is provided, proof is made before a court of record of the facts alleged, there is the verdict of a jury of six men, and if, by the 4th section, after the verdict of the jury the judge is of the opinion that the girl should be sent to the industrial school, then he may order that she be committed there. Provision is made for a discharge from the school, when proper, through the managers, and the Governor may at any time order a discharge. This institution is not a prison, but it is a school, and the sending of a young female child there to be taken care of, who is uncared for, and with no one to care for her, we do not regard imprisonment. We perceive hardly any more restraint of liberty than is found in any well regulated school. Such a degree of restraint is essential in the proper education of a child, and it is in no just sense an infringement of the inherent and inalienable right to personal liberty so much dwelt upon in the argument.

The power conferred under the act in question upon the county court is but of the same character of the jurisdiction exercised by the court of chancery over the persons and prop-

erty of infants, having foundation in the prerogative of the Crown, flowing from its general power and duty, as *parens patriæ*, to protect those who have no other lawful protector. (2 Story's Eq. Jur. sec. 1333.) That jurisdiction extends to the care and person of the infant, so far as is necessary for his protection and education, and upon this ground that court interferes with the ordinary rights of parents in regard to the custody and care of their children, for although, in general, parents are intrusted with the custody of the persons and the education of their children, yet this is done upon the natural presumption that the children will be properly taken care of, and will be brought up with a due education. But whenever this presumption is removed, and the parent is grossly unfit and fails in this respect, the court of chancery will interfere, and deprive him of the custody of his children, and appoint a suitable person to act as guardian, and to take care of them, and to superintend their education. (Ibid. sec. 1341.) The statute in question provides that if the court finds that the parent is not a fit person to have the custody of the infant, the court may appoint the president, or any one of the vice-presidents, of such industrial school the guardian of the infant, and such guardian shall permit such infant to be placed under the care and in the custody of such industrial school, and the court here accordingly made such appointment of guardian. It is a statute making provision for the needed control and care of female infants which they are found to be destitute of, and which parents should bestow, and when the superintendence in this respect, which is required, is assumed on the part of the State, there should be in the agency which the State makes use of, the same power of needful restraint in the child's care and education as belonged to the parent. The right to liberty which is guaranteed is not that of entire unrestrainedness of action. Civil government in itself implies an abridgment of natural liberty. "Civil liberty, which is that of a member of society,

is no other than natural liberty, so far restrained by human laws (and no farther) as is necessary and expedient for the general welfare." (1 Black. Com. 125.) It is not natural but civil liberty of which a person may not be deprived without due process of law. There are restrictions imposed upon personal liberty which spring from the helpless or dependent condition of individuals in the various relations of life, among them being those of parent and child, guardian and ward, teacher and scholar. There are well recognized powers of control in each of these relations over the actions of the child, ward or scholar, which may be exercised. These are legal and just restraints upon personal liberty which the welfare of society demands, and which, where there is no abuse, entirely consist with the constitutional guaranty of liberty. See Cooley's Const. Lim. 339, 342.

We find here no more than such proper restraint which the child's welfare and the good of the community manifestly require, and which rightly pertains to the relations above named, and find no such invasion of the right to personal liberty as requires us to pronounce this statute to be unconstitutional. The decision in 55 Ill. as to the reform school, we do not think should be applied to this industrial school. The courts in other States have sustained similar laws. *Ex parte Crouse*, 4 Whart. 11; *Roth & Boyle* v. *House of Refuge*, 31 Md. 329; *Prescott* v. *The State*, 19 Ohio St. 184; *Milwaukee Industrial School* v. *Supervisors of Milwaukee Co.* 40 Wis. 328.

It is objected that there was not reasonable notice given. The statute provides merely that notice to the parents shall be given. There was here written notice served upon the mother, with a copy of the petition, on the day before the trial. The step-father appeared. We think there was notice in compliance with the statute. There was opportunity to be present, and to apply for further time if not ready for the investigation.

A jury of twelve men was demanded and denied, and it is insisted there was error in this denial. The statute provides for a jury of only six. The constitutional provision that "the right of trial by jury, as heretofore enjoyed, shall remain inviolate," does not apply. This is not a proceeding according to the course of the common law, in which the right of a trial by jury is guaranteed, but the proceeding is a statutory one, and the statute, too, enacted since the adoption of the constitution. There was not, at the time of such adoption, the enjoyment of a jury trial in such a case. In reference to this subject generally, Judge Cooley, in his work on Constitutional Limitations, p. 319, remarks: "But in those cases which formerly were not triable by jury, if the legislature provide for such a trial now, they may doubtless create for the purpose a statutory tribunal composed of any number of persons, and no question of constitutional power or right could arise." And see *Ross* v. *Irving*, 14 Ill. 171.

The act requires the payment of $10 per month by the county for each girl sent from any county. It is insisted that this is in violation of the provision of the constitution that "the General Assembly shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes," etc. This is a minor independent feature of the act, which, if invalid, would not affect the other distinct portions of the act, and hence its consideration is not necessary in this case. It will be time to consider it when the county makes resistance and presents the question for determination.

The judgment of the county court will be affirmed.

Judgment affirmed.

Mr. JUSTICE WALKER: I dissent to this opinion and judgment.

NOVEL BLAIR *et al.*

v.

JAMES N. READING *et al.*

Filed at Ottawa June 21, 1882.

1. SUPERSEDEAS BOND—*when a dismissal of the writ of error amounts to an affirmance of the judgment—as affecting liability on the bond.* A dismissal of a writ of error for want of prosecution, where the court has jurisdiction of the case, is treated as an affirmance of the decree or judgment below, within the meaning of the usual conditions in a *supersedeas* bond; but the rule is otherwise when the writ of error is dismissed for want of jurisdiction.

2. Where the order granting a *supersedeas* required it to be given conditioned that the defendant should perform the decree against him in case it should be "affirmed by the dismissal of" the writ of error, and the bond given contained this condition and the words "in case the said writ of error shall be dismissed," and the writ of error was dismissed by this court for want of jurisdiction, it was *held*, that the condition must be understood as the same as the order—that is, that in case the decree should be affirmed by the dismissal of the writ, and that the dismissal of the writ for want of jurisdiction was not an affirmance of the decree so as to make the obligors of the bond liable thereon.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Will county; the Hon. JOSIAH MCROBERTS, Judge, presiding.

Mr. W. T. HOPKINS, and Mr. A. W. BULKLEY, for the appellants.

Messrs. HILL & DIBELL, for the appellees.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

This action in form is in debt, and was brought on a *supersedeas* bond. Previous litigation between the plaintiffs in this suit and the principal defendant, resulted in the former obtaining a decree against the latter for several sums of money, amounting in the aggregate to a considerable

sum. That decree defendant desired to have reviewed in the Supreme Court, and for that purpose made an application to a justice of the Supreme Court, at his chambers, in vacation, for a *supersedeas*, that the proceedings against him might be stayed until the determination of the case on the writ of error he was about to sue out. On presenting a transcript of the decree and other proceedings against him, the justice of the Supreme Court to whom the application was made indorsed on the record an order making the writ of error to be issued therein a *supersedeas*, in accordance with the provisions of the statute, on defendant giving bond in a sum fixed by such order, with his co-defendants as sureties, which order provided the bond to be given should be conditioned to pay to plaintiffs the sums of money mentioned in the decree, in case the decree set out in the transcript should be "affirmed by the dismissal of said writ of error or upon hearing, and for the payment of whatever judgment may be rendered in the Supreme Court." The *supersedeas* bond required by the order to be given, was given with sureties, as previously stated. In the bond it was recited what the order of the justice of the Supreme Court making it required it should contain, and the condition was in the usual form, viz., that the principal would perform the decree against him in case the writ of error should be dismissed, or the decree should be affirmed in the Supreme Court, and moreover pay whatever judgment or decree should be rendered against him in the Supreme Court. Breaches on the conditions of the bond were assigned, to which defendants filed six pleas, to all of which, except the second in the series, a demurrer was sustained by the court. A trial was had on the plea of *non est factum*, which resulted in a judgment in favor of plaintiffs for the aggregate amount of the several sums mentioned in the decree, against the principal defendant.

It will only be necessary to notice matters set up in the special pleas by way of defence to the breaches assigned on

the bond declared on. Of course the demurrer admits the facts alleged in the special pleas to be true, and the question raised is, whether they constitute any defence to the action. It will simplify the discussion very much if the exact point at issue shall be first ascertained. It is not claimed the original decree against the principal in the bond was affirmed on a hearing of the cause in the Supreme Court, nor that the Supreme Court rendered any judgment against him that he did not pay and discharge. It is averred, as breaches of the conditions of the bond, that defendant did not prosecute his appeal with effect, but made default in that regard, and did not pay the sums of money specified in the decree contained in the transcript. It was upon that issue made by the pleadings the cause was tried, and as the matters alleged in defence were deemed insufficient in law to bar the action, judgment was rendered against defendants.

It will be observed the order of the justice of the Supreme Court granting the *supersedeas* required the bond to be conditioned the defendant should perform the decree against him in case it should be "affirmed by the dismissal of said writ" of error. The bond itself contains this condition, and by the words "in case the said writ of error shall be dismissed" must be understood what the order itself required, viz., that in case the decree shall be "affirmed by the dismissal of the writ." Otherwise the obligatory part of the bond would be broader and more comprehensive than the order required it should be, and would be inconsistent with itself. As a matter of fact, the decree contained in the transcript was not "affirmed by a dismissal of the writ" of error in the Supreme Court. It was dismissed for want of jurisdiction in the court to hear the writ at all. That was in no sense an affirmance of the original decree. A dismissal of a writ of error for want of prosecution when the court has jurisdiction of the case, has always been treated as an affirmance of the decree or judgment, within the meaning of the usual conditions of

Syllabus.

such bonds. But the rule must be different where the court has no jurisdiction in the premises. It is for the obvious reason the court has no jurisdiction to pronounce a judgment of affirmance, and it would be a *non sequitur* to say a court may affirm a decree when it has no jurisdiction to hear the case for any purpose.

The judgment of the Appellate Court will be reversed, and the cause remanded.

Judgment reversed.

103 378
27a 633
103 378
30a 74
103 378
161 425
103 378
46a 376
47a 164
103 378
176 495
103 378
178 307
80a 202
103 378
180 375

JOHN DIVERSEY *v.* BYRON M. SMITH

and

THOMAS M. BURKETT *et al. v.* JOHN PLANKINTON *et al.*

Filed at Ottawa June 21, 1882.

103 378
207 *360

1. ACTION—*whether it survives after defendant's death.* An action to recover a statutory penalty does not survive the death of the defendant, and a writ of error from the Appellate Court to reverse a judgment in favor of the defendant against his executors is properly dismissed.

2. STOCKHOLDERS—*individual liability—as to the mode in which it may be fixed—under constitution of 1848.* Section 2, art. 10, of the constitution of 1848, not having directed any specific way in which "dues from corporations not possessing banking powers or privileges, shall be secured," and allowing it to be "by such individual liabilities of the corporators as may be prescribed by law," any means provided by the General Assembly for that purpose would seem to meet that requirement, and should the General Assembly determine to secure such dues by individual liabilities of the corporators, there is no restriction or limitation as to the manner in which it shall be done. It may therefore secure such dues by making the corporators liable individually to penalties, as a reasonable and effective mode.

3. SAME—*reservation of power in charter, as limiting the mode of fixing liability of stockholders.* A reservation in an amendment to the charter of an insurance company, of the right of the legislature to bring the corporation under the operation of general laws, does not bind the legislature to enact any specific law, and does not operate as a contract with the stockholders that they shall be subjected to any specific additional primary liability on their contracts of subscription. It only gives a discretion to enact such gen-

eral law as the legislature in its discretion deems best for the public good, and such laws may be penal in their character as to the liability of stockholders.

4. SAME—*as to the nature of the liability of stockholders, whether arising as a penalty, or upon contract.* Where a statute relating to a corporation declares that it shall not transact business until certain preliminary things have been done, and if it does so transact business in violation of such provision the trustees and corporators shall be liable to the creditors to a given amount, the liability so imposed is a penalty for violating the law, or allowing it to be done. But where the statute declares the corporation may transact business and the stockholders shall be liable for its debts contracted, either absolutely or until some subsequent thing shall be done, their liability is primary, and is based upon a contract. In the other case it is based upon a tort.

5. SAME—*insurance companies—requirements of the general law of 1869, as preliminary to right to transact business.* Under the general Insurance law of 1869 an insurance company has no authority to commence business and issue policies until after the Auditor of Public Accounts shall have delivered to it a certified copy of its charter and of the certificates required to be filed with the Auditor, and the company shall have filed them in the office of the proper county clerk for record, and any attempt on its part to do so before this is done is in direct violation of the statute.

6. SAME—*nature, character and extent of liability of stockholders in insurance companies—under law of 1869.* The individual liability of a stockholder, under section 16 of the act in force July 1, 1869, entitled "An act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois," is a penalty prescribed for transacting business before the company has complied with the requirements of that act, by having all its stock paid in, and receiving from the Auditor a certified copy of its charter and of the certificates required to be filed, and is in the nature of a punishment for the violation of the provisions of such act. The act creates no primary liability by way of contract between the stockholder and creditors of the corporation for the debts thereof, and hence the right of action given does not survive the death of the stockholder.

7. Although an insurance company is prohibited from commencing business and issuing policies before certain things are done which are essential to constitute a license or authority, if in defiance of such prohibition it should commence business and issue policies, as between it and the other contracting party, who has performed his part of the contract and paid his money, the company will be estopped to deny its authority to make the contract, and it will be liable in an action thereon at the suit of the creditor; but such debts are not made by the statute the debts or liabilities of the trustees or corporators. The latter are not made liable jointly and severally with the company. Their liability to the creditors is not for their indebtedness, but for that of the company, as a penalty for allowing it to do business in violation of law.

Statement of the case.

8. The individual liability of a trustee or corporator of an insurance company, under the act of 1869, to creditors of the company, when it has not complied with the law, does not depend upon the fact the creditor has sustained any actual loss or injury by the failure of the trustees or corporators. The creditor is only required to show the company owes him, and that the whole amount of the capital of the company has not been paid in, and a certificate thereof recorded, as provided by the act.

9. PENAL STATUTE—*defined.* A penal statute is an act by which a forfeiture is imposed for transgressing the provisions of the act. It may also be remedial in one part, and penal in another. The effect, and not the form, of the statute is to be considered, and if its object is clearly to inflict a punishment on a party for doing what is prohibited, or failing to do what is commanded to be done, it is penal in its character, and the circumstance that, in punishing, a remedy is likewise afforded to those having an interest in the observance of the statute, is unimportant.

10. STATUTE—*construction—when affirmative words operate negatively.* It is a maxim generally true, that if an affirmative statute, which is introductive of a new law, directs a thing to be done in a certain manner, that thing shall not be done in any other manner, even though there be no negative words. Hence, a provision that certain things shall be done to constitute a license or authority, is equivalent to an express prohibition against the license or authority unless those things shall be done.

APPEALS from the Appellate Court for the First District;—heard in that court on writs of error to the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

The first of these actions, *Diversey* v. *Smith*, was an action of debt, brought by John Diversey, for use, etc., a creditor of the Germania Insurance Company, a corporation organized under an act of the legislature of this State for the business of fire insurance, against Solomon A. Smith, appellee's testator, who was a stockholder in the corporation, to enforce his individual liability as a corporator under the general laws of the State. The defendant demurred to the plaintiff's declaration, and the Superior Court of Cook county sustained the demurrer. The appellant appealed to the Appellate Court, and during the pendency of that appeal the defendant died. His death was suggested, and on motion a *scire facias* was issued to the appellee, the executor of the last will of

the defendant. The Appellate Court, on appellee's motion, dismissed the appeal, on the ground that the cause of action did not survive the defendant's death against his legal representatives. From that order appellant appealed to this court.

MESSRS. SHUFELDT & WESTOVER, for the appellant, made the following among other points:

The constitution of 1848, under which the charter was granted, required that dues from such corporations should be "secured by such individual liabilities of the corporators, or other means," as might be prescribed by law. By an amendment to the charter, accepted prior to the passage of the general law of 1869, a right was reserved by the State to bind it in the future by general law. These provisions created each a compact between the company and the State, and the subsequent general law securing creditors by a limited liability of stockholders was but carrying these compacts into effect, and is not a penalty, unless made so by its terms. *Arenz* v. *Weir*, 89 Ill. 15; *Union Iron Co.* v. *Pierce*, 4 Biss. 327; *Butler* v. *Walker*, 80 Ill. 345; *Gulliver* v. *Rœlle*, 100 id. 141; *Tomlinson* v. *Jessup*, 15 Wall. 457; *Miller* v. *State*, 15 id. 478; *Sherman* v. *Smith*, 1 Black, 587; *McLaren* v. *Pennington*, 1 Paige, 102; *In re Reciprocity Bank*, 22 N. Y. 9; *In re Oliver Lee's Bank*, 21 id. 9; *Bailey* v. *Hollister*, 12 id. 112; *Stanley* v. *Stanley*, 26 Maine, 191.

The language of the statute, that the corporators "shall be severally liable for all debts," etc., "to the amount by him or them subscribed, until the whole amount of the capital of such company shall have been paid in, and a certificate thereof recorded," imposes no penalty, but defines an original liability, as required by the constitution. *Aspinwall* v. *Sacchi*, 57 N. Y. 331; *Bird* v. *Hayden*, 1 Robertson, 383; *Corning* v. *McCullough*, 1 Comst. 47; *Coleman* v. *White*, 14 Wis. 762; *Culver* v. *Third Nat. Bank*, 64 Ill. 529; *Fuller* v. *Ledden*, 87 id. 310; *Harger* v. *McCullough*, 2 Denio, 123; *Norris* v.

Wrenschall, 34 Md. 492; *Paine* v. *Stewart*, 33 Conn. 516; *Young* v. *Rosenbaum*, 29 Cal. 646.

A statutory penalty is imposed by way of a fine or punishment for the non-performance of a duty imposed by statute, or for the performance of an act forbidden by statute. *Cable* v. *McCune*, 26 Mo. 371; *Provident Savings Inst.* v. *Skating Rink*, 52 id. 552; *Gregory* v. *German Bank of Denver*, 33 Col. 332; *Union Iron Co.* v. *Pierce*, 4 Biss. 327; *Derrickson* v. *Smith*, 27 N. J. 166; *Craw* v. *Easterly*, 4 Lans. 513; *Kelton* v. *Phillips*, 3 Mass. 361; *Franklin Glass Co.* v. *White*, 14 id. 286; *Ripley* v. *Sampson*, 10 Pick. 370; *Stedman* v. *Evelith*, 6 Metc. 119; *Bolen* v. *Crosby*, 49 N. Y. 183; *Whitney Arms Co.* v. *Barlow*, 41 N. Y. St. 220; *Jones* v. *Barlow*, 38 id. 142; *Nemmons* v. *Tappan*, 2 Sweeney, 652; *Strong* v. *Sproul*, 4 Daly, 326; *Barnett* v. *A. & P. R. R. Co.* 68 Mo. 56; *Nassau Bank* v. *Brown*, 30 N. J. Eq. 478; *Sturges* v. *Burton*, 8 Ohio St. 215; *Irvine* v. *McKeon*, 23 Cal. 472; *Lawler* v. *Burt*, 7 Ohio St. 341; *First Nat. Bank* v. *Price*, 33 Md. 487; *Garrison* v. *Howe*, 17 N. Y. 458; *Andrews* v. *Murray*, 33 Barb. 354; *Shaler* v. *Bliss*, 34 id. 309; *Boughton* v. *Otis*, 21 N. Y. 261; *Squire* v. *Brown*, 22 How. 45; *Halsey* v. *McLean*, 12 Allen, 438; *Bank* v. *Commonwealth*, 26 Pa. 451; *Kritzer* v. *Woodson*, 19 Mo. 327; *Hill* v. *Frazier*, 22 Pa. 230; *Norris* v. *Wrenschall*, 34 Md. 492; *Cameron* v. *Seamen*, 69 N. Y. 396; *Steam Engine Co.* v. *Hubbard*, 101 U. S. 188; *Merchants' Bank* v. *Bliss*, 35 N. Y. 412; *Corning* v. *McCullough*, 1 Comst. 47.

In general, liabilities of this nature, or kindred liabilities, have been held to survive the death of the stockholder. *Bailey* v. *Hollister*, 12 N. Y. 112; *Burr* v. *Wilcox*, 22 id. 551; *Diven* v. *Duncan*, 41 Barb. 520; *Diven* v. *Lee*, 36 id. 302.

There is a clear distinction between a liability that is primary, and therefore *ex contractu*, and one for a wrong doing and in tort. As an illustration of the former, see *Corning* v. *McCullough*, 1 Comst. 47; *Allen* v. *Sewall*, 2 Wend. 338;

Moss v. *Oakley*, 2 Hill, 265; *Bailey* v. *Blancker*, 3 id. 188; *Harger* v. *McCullough*, 2 Denio, 119; *Ex parte Van Riper*, 20 Wend. 614. In illustration of such as are in tort, see *Garrison* v. *Hare*, 17 N. Y. 458; *Andrews* v. *Murray*, 33 Barb. 354; *Shaler* v. *Bliss*, 34 id. 309; *Boughton* v. *Otis*, 21 N. Y. 261; *Squire* v. *Brown*, 22 How. 45; *Halsey* v. *McLean*, 12 Allen, 438; *Lawler* v. *Burt*, 7 Ohio St. 341; *Derrickson* v. *Smith*, 27 N. J. 166; *Bank* v. *Commonwealth*, 26 Pa. 451; *Kritzer* v. *Woodson*, 19 Mo. 327; *Hill* v. *Frazier*, 22 Pa. 230.

Mr. JOHN S. COOPER, for the appellee Smith:

The liability imposed upon stockholders of insurance companies, by section 16 of the act of 1869, is penal in its character, and can be sustained only on that ground. *Weidenger* v. *Spruance*, 101 Ill. 278; *Gulliver* v. *Rœlle*, 100 id. 141; *Gridley* v. *Barnes et al.* 103 id. 211; *Merchants' Bank of New Haven* v. *Bliss et al.* 35 N. Y. 412; *Losee et al.* v. *Bullard*, 79 id. 404; *First National Bank* v. *Price et al.* 33 Md. 487; *Derrickson* v. *Smith*, 27 N. J. L. 166; *Cairo and St. Louis R. R. Co.* v. *Warrington*, 92 Ill. 157; *Cable* v. *McCune*, 26 Mo. 380; *Halsey* v. *McLean*, 12 Allen, 438; *Sturges* v. *Burton*, 8 Ohio St. 215; *Lawler* v. *Burt*, 7 id. 340; *Moies* v. *Sprague, Admr.* 9 R. I; *Steam Engine Co.* v. *Hubbard*, 101 U. S. (11 Otto,) 188; *Richardson* v. *Aikin*, 87 Ill. 138.

Mr. JOHN H. THOMPSON, for the appellees Plankinton and others:

A writ of error against an executor will be abated when the cause of action does not survive. *Barrett et ux.* v. *Gaston, Exr.* Breese, 255.

A provision of law imposing an individual liability for a corporate debt, is to be construed strictly. *Gray* v. *Coffin et al.* 9 Cush. 199; *Moyer* v. *Pennsylvania S. Co.* 71 Pa. St. 293; *Appeal of Means*, 85 id. 75.

The legislature may impose a reasonable penalty for the non-performance of a legal duty, although the duty may have been declared, and its performance enjoined, by the principles of the common law or by a prior statute. *Chicago, Rock Island and Pacific R. R. Co.* v. *Reidy*, 66 Ill. 43; *Chicago and St. Louis R. R. Co.* v. *Warrington*, 92 id. 157; *Burnett* v. *Chicago and Pacific R. R. Co.* 68 Mo. 56.

The liability imposed by sec. 16 of the general Insurance act of 1869, is a statutory penalty. *Weidenger* v. *Spruance*, 101 Ill. 278; *Bank* v. *Price et al.* 33 Md. 487; *Cameron* v. *Seaman*, 69 N. Y. 396; *Derrickson* v. *Smith*, 27 N. J. L. 166; *Steam Engine Co.* v. *Hubbard*, 101 U. S. 188; *Kritzer* v. *Woodson*, 19 Mo. 327; *Cable* v. *McCune*, 26 id. 371; *Hill* v. *Frazier*, 22 Pa. St. 320; *Harrisburg Bank* v. *Commonwealth*, 26 id. 451; *Lawler* v. *Burt*, 7 Ohio St. 341; *Sturges* v. *Burton*, 8 id. 215; *Halsey* v. *McLean*, 12 Allen, 438.

When a statute, directly or indirectly, requires a company, its officers or stockholders, to do anything, or prohibits the company or its officers from doing a thing, and imposes a liability for its violation upon either the company, its officers or stockholders, such statute is of a penal character. But when the statute imposes a liability on the stockholders for some benefit to the public, or to some class, and contains no command to do or not to do anything, it is not penal, but creates a primary liability *ex contractu* upon the stockholder.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

In these cases the facts are, in all material respects, similar, and the single question presented by the record, and discussed in arguments of counsel, is common to both. In each the action is debt, upon a policy of insurance issued by a company which was organized under a special charter enacted by the General Assembly long prior to July 1, 1869, against a stockholder of the company, who had become such by making, and performing on his part, a contract of sub-

scription for stock, prior, also, to July 1, 1869. Judgments were rendered in the Superior Court of Cook county for the defendants. From those judgments appeals were taken to the Appellate Court for the First District, and while the appeals were there pending, and before argument, the defendants died, testate. The deaths of the defendants were suggested, and thereupon writs of error were sued out and served, making their executors parties. On motion of the executors, the Appellate Court dismissed the writs of error, and gave judgments for costs. To reverse those judgments the present appeals are prosecuted.

For convenience we shall treat the cases as one, and speak of the parties in the singular number only.

If the action is for a statutory penalty, it does not survive the death of the testator, and the writ was properly dismissed, as is conceded by counsel for appellant. 1 Chitty's Pleadings, (7th Am. ed.) 103, *104; *Hambly* v. *Trott*, Cowp. 372; *Barret et ux.* v. *Gaston*, Breese, 255. The question, therefore, is, whether the action is on a contract or for a statutory penalty.

We do not think it needful at this time to discuss whether it was competent for the General Assembly to impose a primary double liability on stockholders in insurance companies, by a law enacted subsequent to the making and performing, on their part, of their contracts of subscription, since, in our opinion, no such law has been enacted, and it will be quite time enough to consider that question when it shall be properly before us for determination. Sec. 2 of art. 10 of the constitution of 1848, directs no specific way in which "dues from corporations not possessing banking powers or privileges shall be secured." It allows it to be "by such individual liabilities of the corporators, or other means, as may be prescribed by law." Hence any means provided by the General Assembly for that purpose would seem to meet the requirement, and should the General Assembly determine to secure

such dues by individual liabilities of the corporators, there is no restriction or limitation as to the manner in which it shall be done. It is therefore impossible to say that it may not be by making the corporators liable, individually, to penalties, because it is manifest this might be a reasonable mode, and a very effective one, too, of securing such dues.

We also think it quite obvious that the reservation in the amendment to the charter of the insurance company of the right of the General Assembly to bring the corporation under the operation of general laws, bound the General Assembly to enact no specific law, and did not operate as a contract with the stockholders that they should be subjected to any specific additional primary liability on their contracts of subscription. Had a law imposing additional primary liability been enacted, it would have been pertinent to have inquired whether it was within the power reserved to the General Assembly; but no one can reasonably claim that the mere reservation of power to enact a general law in regard to insurance companies, did of itself constitute such a law. At most it could only be said the General Assembly reserved the right, to be exercised in its discretion, to enact such general laws in regard to insurance companies as, in the opinion of its members, the public welfare should require. We are unable to conceive of a valid reason why such laws might not be penal in their character.

In our opinion, therefore, necessarily, neither the constitutional provision nor the reservation in the amendment to the insurance charter referred to, can furnish any aid in determining whether the present action is on a contract or for a statutory penalty. What has been enacted must be determined by an examination of the act itself, the power to so enact not being now in question.

The action is brought under the provisions of "An act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois,"

in force July 1, 1869, (Rev. Stat. 1874, p. 591,) and the portions of the several sections necessary to a solution of the question before us are as follows: The 1st section authorizes any number of persons, not less than thirteen, to associate and form an incorporated company for the purpose of making insurance, etc. The 3d section requires that "such persons shall file in the office of the Auditor of Public Accounts a declaration, signed by all the corporators, expressing their intention to form a company for the purpose of transacting the business of insurance, as expressed in the 1st section of this act, which declaration shall also comprise a copy of the charter proposed to be adopted by them, and shall publish a notice," etc. The 7th section provides that "it shall and may be lawful for the individuals associated for the purpose of organizing any company under this act, after having published the notice and filed the declaration and charter, as required by the 3d section of this act, and also on filing in the office of the Auditor of Public Accounts proof of such publication, * * * to open books for subscription to the capital stock of the company so intended to be organized, and to keep the same open until the full amount specified in the charter is subscribed," etc. The 8th section directs how its capital shall be invested. The 9th section provides what real estate may be owned. In the 10th section it is enacted that "the charter and proof of publication herein required to be filed by every such company shall be examined by the Attorney General, and if found conformable to this act, and not inconsistent with the constitution or laws of this State, shall be certified by him to the Auditor of Public Accounts, who shall thereupon cause an examination to be made, either by himself or by three disinterested persons specially appointed by him for that purpose, who shall certify, under oath, that the capital herein required of the company named in the charter, according to the nature of the business proposed to be transacted by such

company, has been paid in, and is possessed by it in money, or in such stocks and bonds and mortgages as are required by the 8th section of this act; * * * and the corporators and officers of such company shall be required to certify, under oath, that the capital exhibited to those persons is *bona fide* property of the company. Such certificate shall be filed in the office of the said Auditor, who shall thereupon deliver to such company a certified copy of the charter and of said certificates, which, on being filed in the office of the clerk of the county where the company is to be located, shall be their authority to commence business and issue policies; and such certified copy of the charter and of said certificates may be used in evidence for or against said company."

It thus conclusively appears that until after the Auditor of Public Accounts shall have delivered to the company the certified copy of the charter and certificates, and the company shall have filed them in the office of the proper county clerk, there is no authority whatever for the company to commence business and issue policies, and any attempt on its part to do so before, is in direct violation of the statute, for a provision that certain things shall be done to constitute a license or authority, is equivalent to an express prohibition against the license or authority unless those things shall be done. "It is," says Dwarris, "a maxim, generally true, that if an affirmative statute, which is introductive of a new law, directs a thing to be done in a *certain manner*, that thing shall not, even although there are no negative words, be done in any other manner." Potter's Dwarris on Statutes, 72.

The command of the law then is, business shall not be commenced, and policies issued, unless those things are done which are required as a license or authority to commence business and issue policies; and to compel obedience to this command, the 16th section imposes a punishment for its violation, namely: "The trustees and corporators of any company organized under this act shall be severally liable

for all debts or responsibilities of such company to the amount by him or them subscribed, until the whole amount of the capital of such company shall have been paid in, and a certificate thereof recorded, as hereinafter provided." * * * "Dues" from such corporations "are secured as prescribed by law," in the requirement that the capital of the company "has been paid in, and is possessed by it in money, or in such stocks and bonds and mortgages as are required by the 8th section of this act," before they are allowed to commence business, and in the enforcement of this requirement by penalties of individual liability upon the trustees and corporators. Still, although the company is thus prohibited from commencing business and issuing policies before those things are done which are essential to constitute a license or authority, if, in defiance of this prohibition, it should commence business or issue policies, as between it and those with whom it should assume to contract, it would, after the other party had performed his part of the contract and the company had received the benefit of it, be estopped to deny its authority to make the contract, and would be liable thereon in an action at the suit of the creditor. *Bradley* v. *Ballard*, 55 Ill. 413; *Darst* v. *Gale et al.* 83 id. 136; *Peoria and Springfield R. R. Co.* v. *Thompson*, *ante*, 187. See, also, Field on Corporations, secs. 259, 260, 261; 2 Parsons on Contracts, 790. Such debts or responsibilities are, therefore, legally the debts or responsibilities of the company, and it is to be noted the 16th section does not provide the debts or responsibilities thus contracted shall be deemed and treated as the debts or responsibilities of the trustees or corporators, instead of the company, or jointly and severally of the trustees and corporators and company, but expressly designates them as "the debts or responsibilities of such company." The company is treated as primarily liable, and the trustees and corporators are held liable not because of *their* debt or responsibility, or of *their*

and the company's debt or responsibility, but solely on account of the debt or responsibility of the company.

At common law a trustee or corporator is not liable for a debt contracted by a corporation, and if he shall be made primarily liable for such debt by statute, it must be because the statute in some way makes him a contractor in such case. It must be within contemplation of law, at least, that the company can contract on behalf of trustees and corporators, or on behalf of itself and them. To create such a relation, in the absence of an express contract, the authority would necessarily have to affirmatively appear in the statute. But the statute under consideration, instead of containing language to that effect, prohibits the making of all contracts. It imposes the liability upon the trustees and corporators, not because the company was authorized to contract in their names or on their behalf, or so as to otherwise bind them, but because it prohibited the commencing of business and issuing of policies, and the trustees and corporators, in violation of their duty, caused or permitted business to be commenced and policies to be issued. Sedgwick says: "Penal statutes are acts by which a forfeiture is imposed for transgressing the provisions of the act." He moreover adds: "A penal law may also be remedial, and a statute may be remedial in one part and penal in another." (Stat. and Const. Law, 41.) In Potter's Dwarris on Statutes, 74, it is said: "A penal statute is one which imposes a forfeiture or penalty for transgressing its provisions or for doing a thing prohibited." It is the effect, not the form, of the statute that is to be considered, and when its object is clearly to inflict a punishment on a party for violating it—*i. e.*, doing what is prohibited, or failing to do what is commanded to be done,—it is penal in its character, and the circumstance that in punishing, remedy is likewise afforded to those having an interest in the observance of the statute, is unimportant.

Accepting it as settled that the liability imposed is not a primary liability, a significant, and, to us, conclusive, fact to be taken into consideration in the character of liability imposed by the 16th section is, that the plaintiff's right of recovery is totally unaffected by any actual loss or injury he may have sustained by the failure or neglect of the trustees or the corporators. Although he might collect the debt from the corporation, this is no defence. Whether all the capital, or all but a nominal sum, or whether but an insignificant amount of the capital, has been collected and paid in, would obviously be unimportant inquiries. He is only required to show that he is a creditor of the company—that the defendant is a trustee or corporator, and that the whole amount of the capital of such company has not been paid in, and a certificate thereof recorded, as provided in the 10th section of the act.

Counsel for appellant refer to and rely upon *Corning* v. *McCullough*, 1 Comst. 47, *Coleman* v. *White*, 14 Wis. 762, *Harger* v. *McCullough*, 2 Denio, 123, *Paine* v. *Stewart*, 33 Conn. 516, *Young* v. *Rosenbaum*, 39 Cal. 646, *Fuller* v. *Ledden*, 87 Ill. 310, *Aspinwall* v. *Sacchi*, 57 N. Y. 331, *Norris* v. *Wrenschall*, 34 Md. 492, *Culver* v. *Third National Bank*, 64 Ill. 529, *Steele* v. *Dunn*, 65 id. 298, and *Corwith* v. *Culver*, 69 id. 502. These cases are all plainly distinguishable from the present case.

In *Corning* v. *McCullough*, the statute provided, in one of its sections, (sec. 9,) "that the stockholders of the corporation shall be jointly and severally personally liable for the payment of all debts and demands contracted by the corporation, and that any person having any demand against such corporation may sue any stockholder or director in any court having cognizance thereof, and recover the same, with costs." The liability was thus unquestionably primary, and bound the stockholders, without limitation, to the payment of all corporate debts. The court, in speaking of it, said: "The

personal liability of the stockholder to creditors under this charter, for the debts of the company, is an element of the incorporation which wholly excludes all claim of any stockholder to treat those debts as debts of the corporate body, solely, which he did not contract and is not bound to pay. The stockholders all stand under this act of incorporation on the same ground, and under the same responsibility, as respects creditors, as they would if unincorporated have stood." There was lawful authority to contract debts, and by the act of becoming a stockholder the defendant and the other stockholders became jointly and severally liable with the corporation for the debts. *Harger* v. *McCullough* was under the same charter, and deserves no further notice.

In *Paine* v. *Stewart*, the liability was of the same character as that imposed in *Corning* v. *McCullough*.

In *Coleman* v. *White*, the liability was also of like character. The court there said: "We are of opinion that the liability is primary and absolute, and attaches the moment the debt is contracted by the bank; that it is a liability of all the stockholders to all the creditors, on the principle of co-partnership, the stockholders standing on substantially the same footing as though they were partners or unincorporated association, save only that the responsibility of each is limited to a sum equal to his share or shares of stock. Subject to this limitation, they are answerable as original or principal debtors, and their liability more nearly resembles that of co-partners than any other to which it can be compared."

Young v. *Rosenbaum* belongs to the same class of cases. The liability there was primary and absolute. The corporation was lawfully authorized to contract (not prohibited, as here, from contracting,) debts, for which the stockholder was made primarily liable. The court said: "When a debt accrues against the corporation it also accrues against the stockholders, and they remain such debtors until the debt is paid or satisfied."

In *Norris* v. *Wrenschall*, the court distinguishes the case from *Bank of Plymouth* v. *Price et al.* 33 Md. 487, which we shall hereafter refer to, and says: "The section we are now considering not only does not forbid the contracting of debts before the capital stock is paid in, but allows it to be done, on condition that those who are stockholders at the time shall become severally and individually liable therefor."

In *Fuller* v. *Ledden*, the third section of the bank charter expressly provided, that "each stockholder shall be liable to double the amount of stock held or owned by him, and for three months after giving notice of transfer." There was affirmative power in the corporation to contract debts, and a primary liability therefor was imposed on the stockholder.

Culver v. *Third National Bank*, *Steele* v. *Dunn*, and *Corwith* v. *Culver*, were actions brought under the 9th section of "An act to authorize the formation of corporations for manufacturing, mechanical or chemical purposes," (Session Laws of 1857, p. 163,) which provides: "All the stockholders of every such company shall be severally individually liable to the creditors of the company to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company prior to the time when the whole amount of its capital stock shall have been paid in, and a certificate thereof made and filed, as hereinafter required." But section 1 of that act provides, that "any three or more persons who may desire to form a company for the purpose of carrying on any kind of manufacturing * * * business, may make, sign and acknowledge, * * * and file in the office of the clerk of the circuit court, * * * and also in the office of the Secretary of State, a certificate in writing, in which shall be stated the corporate name of the said company, the object for which it is formed, the amount of the capital stock thereof, the term of its existence, the number of shares of which the said stock shall consist, the number of directors, and the names of the persons who shall

be directors," etc. Section 2 provides, the capital stock shall not be less than $10,000, nor more than $500,000, and that it shall be paid in within four years after the date of the license of the incorporation. Section 3 enacts, "that when the certificate shall have been filed, as aforesaid, with the clerk of said court, and a duplicate thereof filed in the office of the Secretary of State, the said clerk shall issue a license to the persons who shall have signed and acknowledged the same, on the reception of which they and their successors shall be a body politic and corporate, * * * and be capable in law of purchasing and holding, conveying and disposing, of any such real and personal estate, choses in action and securities, negotiable or otherwise, as may be expedient and necessary to enable the said company to carry on their operations and business named in such certificate." By the 8th section, "all subscriptions to the capital stock shall be payable in such sums and at such times as the board of directors may require." * * * So, there the capital stock was not required to be paid in as here, before a license issued authorizing the company to commence business, but it was sufficient if it was paid in within four years after the date of such license; and instead of being the duty of the directors, as it is here, to have the capital all paid in before commencing business, they might there lawfully defer its payment to any period within the four years. In short, there the debts for which the stockholders were held liable were contracted pursuant to law, while here those for which they are sought to be held liable were contracted in violation of law.

In substance, the same distinction exists between *Aspinwall* v. *Sacchi*, and the present case. There, also, it was provided, when the certificate as to name, etc., had been filed, "and ten per cent of the capital named paid in, the company was entitled to carry on business." Here, the statute in effect says the thing shall not be done, and if it is done, the trustees and corporators shall be liable, etc. In all the cases

referred to the statute says the thing may be done, and the stockholders, etc., shall be liable, either absolutely or until some subsequent thing shall be done. In the one case the liability is in consequence of violating the law, or suffering it to be violated; in the other the liability is incurred in strict compliance with the law,—in short, in the one case the liability is for a wrong done—a *tort;* in the other it is upon contract. This may be made more clear by referring to some adjudged cases where the same questions, or questions analogous, have been involved.

In *Merchants' Bank of New Haven* v. *Bliss et al.* 35 N. Y. 412, suit was brought against the trustees of a manufacturing company to recover a debt due the plaintiff from the company. The ground of the action was the neglect of the defendants to file certain reports as required by the law. The question was, whether the action was penal. After quoting the sections of the statute applicable, the court said: "Under these sections the trustees are declared to be jointly and severally liable for all the debts of the company in case of a violation of their provisions. The liability, it must be observed, is not limited to the injury or damage sustained by the creditors in consequence of the violation, but upon failure to file the report, or upon making a prohibited dividend, however small or trifling the amount, the trustees are subjected to the payment of the whole amount of the debts of the company then existing, and for all that shall be contracted, in the one case before the report shall be made, and in the other while they shall respectively continue in office. These provisions appear to be severally punitive, inflicted on grounds of public policy for the protection of creditors, and the prevention of frauds upon the public in respect to the financial condition of such corporations. It is clear that the liability of the trustees is not imposed as an indemnity, because it has no relation to the loss or injury sustained by the party in whose favor the action is given. The action

depends wholly upon the statute. There never was any such remedy, or cause of action, in whole or in part, at common law." And it was held the action was for a penalty.

In *First Nat. Bank of Plymouth* v. *Price et al.* 33 Md. 487, suit was brought in Maryland against certain officers of a Pennsylvania corporation, under a Pennsylvania statute making the officers and directors of the corporation liable for the debts of the corporation contracted in excess of the amount of its capital stock. The court, among other things, said: "This liability does not arise upon any contract to which the directors are parties, but is altogether statutory, imposed upon them as wrong-doers, and in its nature penal, and as such can only be enforced within the State where the statute operates."

In *Derrickson* v. *Smith*, 27 N. J. L. (3 Dutcher,) 166, suit was brought against the administrator of a trustee of a New York corporation, to recover the amount of a debt due from the corporation, because of the failure of the trustee to file and publish certain annual reports, as required by a New York statute. The court, in speaking of the liability of the defendant, said: "His liability results from the failure of the trustee to comply with the requirements of the statute. It is, in fact, a penalty inflicted upon the trustee for a failure to perform a duty enjoined by the statute. It is immaterial whether that penalty be a specified sum, or the payment of the debts of the corporation. In either case it is a penalty imposed by statute. Nor is it perceived how the liability of the individual trustee to pay the debts of the corporation can be said, in any proper way, to be founded on contract. It certainly did not result from the contracts made by the corporation, nor from the defendant becoming a stockholder, nor from his accepting the office of trustee, but solely from the omission to comply with the statute. Now, the acceptance of the charter, or the defendant becoming a stockholder, is doubtless an assent to the terms of the charter, but it is,

in no appropriate sense, an engagement to pay the debts of the company imposed as a penalty for violations of the charter. Such liability is clearly the creature of the statute." And it was held there could be no recovery.

In *Kritzer* v. *Woodson*, 19 Mo. 327, the 19th section of the charter provided, that "if the directors of a corporation shall declare and pay dividend when the corporation is insolvent, or the payment of which would render it insolvent, they shall be jointly and severally liable for all debts that shall thereafter be contracted, as long as they shall continue in office, provided that the amount for which they shall all be so liable shall not exceed the amount of such dividend." It was held this liability was for a penalty, and not upon contract. It was said by the court: "It is plain that the section does not make the directors the primary debtors for the excess, for the creditors still have their rights against the corporation, while they have the additional guaranty of the liability of the directors. The words of the act which make them liable for the debts of the company make them liable to those who are the creditors holding such debts against the company. The debts are still the debts of the company." As has been seen, this is precisely the case here. It is added: "The provisions of the section are penal, and are not to be extended beyond the necessary meaning of the language."

In *Lawler et al.* v. *Burt*, 7 Ohio St. 340, an act of the legislature prohibited the issuing and circulating of unauthorized bank paper, and by an amendatory act it was provided "that every stockholder or partner * * * shall be jointly and severally answerable, in their individual capacity, for the whole amount of the bonds, bills, notes and contracts of such bank, hereafter executed," and it was held the liability under this was in *tort*, for a penalty, and not upon contract. See, also, a kindred case, *Sturges et al.* v. *Burton et al.* 8 Ohio St. 215.

Halsey v. *McLean*, 12 Allen, 438, was an action brought in Massachusetts by a creditor of a New York corporation against a stockholder of such corporation. By the statute under which the corporation was organized, it was provided that every company organized under the act should annually, within twenty days from the first day of January, make and publish a report stating the amount of its capital, the proportion paid in, and the amount of all existing debts, "and if any of said companies shall fail so to do, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made." It was held this was highly penal, referring to *Garrison* v. *Howe*, 17 N. Y. 458, and hence that an action could not be maintained thereon in Massachusetts.

In *Cable* v. *McCune*, 26 Mo. 380, the object of the suit was to collect a debt of the corporation from a stockholder because of a failure to publish a certain annual statement. The court, in speaking of the character of the action, said: "Our opinion in this case is based entirely upon the penal character of the statute we are called upon to construe. The corporation is required to publish an annual statement of their condition for the information of the public, and a failure to do so renders the stockholders responsible for a specified class of demands existing prior to or at the time of such publication. The object is to inform the public, who expect to have dealings with such corporations, of their probable responsibility. This liability, in event of there being no required publication, does not depend upon the actual injury which the failure to publish may have occasioned in a given case, but is absolute, dependent only on the proof of publication, or no publication. Such a statute can be regarded in no other light than a penal one." *Moies* v. *Sprague, Admr.* 9 R. I. 1, *Hill* v. *Frazier*, 26 Pa. St. 320, and *Steam Engine Co.* v. *Hubbard*, 101 U. S. (11 Otto,) 188, were decided upon

a like principle. See, also, Thompson's Liability of Stockholders, 84.

It would seem still more evident that in case of stockholders in companies organized under special charters, who had fully paid for their stock before July 1, 1869, the liability imposed by section 16 could not be a primary liability. In *Gulliver* v. *Rœlle*, 100 Ill. 154, we held such stockholders were brought under the general law by the 19th section thereof, and after referring to the 19th and 21st sections, we said: "Until the certificate required by the 10th section was procured and recorded, a company organized under the act is not authorized to transact business, and when companies specially organized were brought under the provisions of the general law, it devolved on them to procure a similar certificate, and record the same, to authorize them to continue in business, and to relieve the shareholders of the liability imposed by the 16th section." And in *Weidenger* v. *Spruance*, 101 Ill. 285, we said, after quoting the 16th section: "The object of this was, unmistakably, to compel such companies, before proceeding further, to have their entire capital paid in. * * * It is, in effect, therefore, saying to old companies whose capital is not all paid in: 'Proceed no further. Stop right here until all your capital stock is paid in; and if you shall disregard this mandate, your trustees and corporators shall be liable for all debts or responsibilities you shall hereafter create.' This is but the imposition of a penalty." And again, in answer to the objection that such a liability impaired the obligation of the contract of subscription of the stockholder, we said: "The liability upon the stockholder is not because he made a contract, which he has performed, to take and pay for so much stock, but because he, as a member of the corporation, and, therefore, a responsible agent in controlling and causing to be executed the corporate powers and functions, has allowed to be done, or failed to prevent the doing of, that

which the law prohibited. As a punishment for the wrong he is responsible for, he is made liable to those injured thereby to the extent of his interest in the corporation, and of his agency presumed therefrom in causing or permitting the injury." As we have before seen, there is a slight inaccuracy in the expression here, although we still think the main idea is entirely correct. The liability is not, in fact, to those alone who are injured, but exists equally where no actual injury has been done, as, for instance, where the corporation is abundantly able to pay all its debts; but the liability is for a wrong done to the public which, presumably, to some extent, is a wrong, also, to every creditor.

In our opinion, counsel are entirely mistaken in saying "the statute does not prescribe some new duty, or forbid some wrongful act, and declare this liability as a penalty." It forbids the wrongful act of proceeding with business and issuing policies when the capital stock is not all paid in and the certificates required by the 10th section are not filed, and declares this liability in consequence of—in other words, as a punishment for—that wrongful act. We repeat, the liability is because of the wrong,—*i. e.*, the failure to perform the duties enjoined by the statute, and not upon the contract of subscription.

Precisely the same question was before us in *Gridley et al.* v. *Barnes et al. ante*, 211, and we there reached the same conclusion we have reached here; and the question was again carefully considered on petition for rehearing in that case, in connection with the arguments in the present case.

We see no cause to disturb the judgments below, and they will therefore be affirmed.

Judgments affirmed.

Syllabus. Statement of the case.

JAMES R. LOCKIE

v.

THE MUTUAL UNION TELEGRAPH COMPANY.

103 401
173 533

Filed at Ottawa June 21, 1882.

1. EMINENT DOMAIN—*rights acquired by condemnation for telegraph purposes.* A telegraph company, by a judgment condemning land for its use under the Eminent Domain act, does not acquire the fee to the land, or the right to use it for any other purpose than to erect telegraph poles and suspend wires upon them, and maintain and repair the same, and use the structure for telegraph purposes. This, of course, gives the company the right, at all times, when necessary to construct or to repair the line, to enter upon the strip condemned, doing as little damage as possible. The company can not cultivate such strip, or take exclusive possession of it, or enjoy it for any other purpose. The only exclusive right of occupancy the company acquires is the ground occupied by the poles erected for telegraph purposes.

2. SAME—*width of strip that may be acquired.* The statute does not designate the width of the strip of land that may be condemned for telegraph purposes, but only authorizes such companies to acquire such an amount of land as may be necessary; and where only one line of poles is specified in the petition, and the evidence does not show that a half a rod in width is an unreasonable amount of land, the judgment condemning that much of the land will be sustained, and will be construed to authorize the erection of but one set of poles.

APPEAL from the County Court of Livingston county; the Hon. ROBERT R. WALLACE, Judge, presiding.

This was a proceeding instituted by the telegraph company under chapters 47, entitled "Eminent Domain," and 134, entitled "Telegraph Companies," of the Revised Statutes of 1874, by petition to the county court of Kankakee county, and change of venue to Livingston, where a trial was had, with a jury, a verdict rendered, and judgment for $50, and an appeal taken to this court by Lockie, the defendant land owner. It seems the strip of land, eight and one-quarter feet wide, sought to be condemned, lies along the right of

way of the Illinois Central Railroad Company. Appellant holds the view that the condemnation of this strip for the use of the telegraph company will render it necessary to erect and maintain a fence along the line of this new right of way, and that the expense thus to be incurred will devolve on the land owner. Appellant contends that the matter of that expense was not properly considered on the trial below.

Mr. WILLIAM POTTER, and Mr. O. G. BARTLETT, for the appellant.

Mr. H. K. WHEELER, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This question turns on the true construction of the Eminent Domain statute. What right does the telegraph company acquire by the judgment of condemnation? It surely was not intended that it should be the fee to the land condemned. The language of the act does not require or sanction such a construction, and to so hold would violate the manifest intention of the legislature. Nor can it be fairly held that it confers the right to use it for any other purpose than that for which it is condemned. The company can not cultivate or take exclusive possession of it, or enjoy it for any other purpose than to erect telegraph poles and suspend wires upon them, and maintain and repair the same, and to use the structure for telegraph purposes, and this is all the petition asks or the statute authorizes. This, of course, gives the company the right, at all times, when necessary to construct or to repair the line, to enter upon the strip condemned, doing as little damage as possible. By designating the width of the strip in the condemnation proceedings the company acquires no right to exclude the owner of the soil from the use of the land. That remains as it was before, except the company has acquired an easement on the strip condemned to so enter

for the purpose of erecting and repairing the line. The only exclusive right of occupancy the company acquires by such a proceeding is the ground occupied by the poles erected for telegraph purposes. These are the rights intended to be conferred by the law, and are all that were or can be acquired under it, and the judgment in this case conferred no more.

It therefore does not become necessary for the appellant to erect a fence to separate this strip from the remainder of his land. Nor does it appear from the evidence that a half of a rod in width is an unreasonable amount of land over which a telegraph company may acquire the right to erect and repair its line. The statute only authorizes such companies to acquire such an amount as is necessary. Nor does the petition specify the erection of more than one set of poles, and the judgment will not be construed to authorize more.

In this view of the case we are unable to perceive any error in the judgment, and it must be affirmed.

Judgment affirmed.

PETER W. FIELD *et al.*

v.

ERIC E. ANDERSON.

103 403
64a 685
103 403
92a 3129

Filed at Ottawa June 21, 1882.

1. TRESPASS—*levy and sale under execution—effect of subsequent reversal of the judgment.* Where an execution, fair on its face, is issued on a judgment of a court of general jurisdiction having jurisdiction of the subject matter and of the parties, and levied on a stock of goods which are sold to a third party by the officer, the plaintiff in the execution will not be liable in trespass, notwithstanding such judgment may have been reversed after the levy and sale, for error. The acts being lawful when done, can not be made tortious by a reversal of the judgment.

2. REVERSAL OF JUDGMENT—*right of restitution.* After the reversal of a judgment, the prevailing party is entitled to restitution of the money received under the judgment. He may recover the money collected on it by

levy and sale to a third party, as so much money had and received to his use, but there is no liability as for a trespass for goods seized and sold prior to the reversal, under an execution issued upon the judgment.

3. APPEAL *from Appellate Court—the record alone will be considered.* This court, on error or appeal, will not notice any proceedings had in the Appellate Court in a different case, which are not presented in the transcript of the record before it, to see on what grounds that court reversed a judgment, nor can it look to the report of such case in that court, where the record shows nothing as to such report.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

Mr. D. BLACKMAN, for the appellants:

Trespass is not sustainable whenever the injury is occasioned by regular process of a court of competent jurisdiction. *Bassett* v. *Bratton*, 86 Ill. 155.

And where the judgment is reversed after the sale of defendant's property, he may recover the money as so much money had and received to his use. *McJilton* v. *Love*, 13 Ill. 494.

Beyond this it imposed no liability. *Camp* v. *Morgan*, 21 Ill. 257; *Clayes* v. *White*, 83 id. 540.

To make him liable there must be a defect of jurisdiction. *Johnson* v. *Von Kettler*, 66 Ill. 63; *Johnson* v. *Maxon*, 23 Mich. 129; *Clark* v. *Pinney*, 6 Cow. 300; *Langley* v. *Warren*, 3 N. Y. 327; *Scholey* v. *Halsey*, 72 id. 578; *Magee* v. *Kellogg*, 24 Wend. 32; *Cummings* v. *Noyes*, 10 Mass. 433; *Delano* v. *Wilde*, 11 Gray, 17; *Raun* v. *Reynolds*, 18 Cal. 275; *Galpin* v. *Page*, 18 Wall. 375.

The judgment prior to the reversal is a sufficient justification to the plaintiff for all acts done in enforcing it. Freeman on Judgments, sec. 482.

The reversal of a judgment can not have a retrospective effect, and make void that which was lawful when done. *Bank of the United States* v. *Bank of Washington*, 8 Pet. 19.

For, as a general rule, there is no trespass by relation. Cooley on Torts, 96; *Bacon* v. *Kimmel*, 14 Mich. 207.

When no trespass is committed by the officer serving the execution, the plaintiff directing is not liable. *Wing* v. *Hussey*, 71 Maine, 185; *Johnson* v. *Von Kettler*, 66 Ill. 63; *Develing* v. *Walton*, 83 id. 390.

The execution was never quashed, vacated, set aside or superseded, as illegally, unduly or irregularly sued out. A party is liable for suing out irregular process, not for the errors in the judgment. *Hayden* v. *Shedd*, 11 Mass. 502.

Messrs. HUTCHINSON & PARTRIDGE, for the appellee:

Process which has been set aside as void or irregular, is no justification for acts done under it, to the party who sues it out. *Parsons* v. *Lloyd*, 2 W. Bl. 846; *Barker* v. *Braham*, 2 id. 868; *Bates* v. *Pilling*, 6 B. & C. 39; *Collett* v. *Foster*, 2 H. & N. 355; *Codrington* v. *Lloyd*, 8 A. & E. 677; *Wooley* v. *Clarke*, 5 Barn. & Ald. 746; *Wehle* v. *Butler*, 43 How. 5; *Lyon* v. *Yates*, 52 Barb. 237; *Kerr* v. *Mount*, 28 N. Y. 659.

The judgment and execution under which appellants sought to justify, had been set aside and vacated before the beginning of this suit, as void, on account of irregularity in the entry of said judgment. *Anderson* v. *Field et al.* 6 Bradw. 307.

Trespass is a proper remedy to recover damage done to the plaintiff by a void or irregular judgment or writ, which has been set aside for that cause before the beginning of the trespass suit. We cite cases *ante* under our first point, and also *Lorimer* v. *Lule*, 1 Chitty, 134; Tidd's Practice, 568, 1032; 2 Addison on Torts, sec. 831.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action of trespass, brought to recover damages for breaking and entering into the store of the plaintiff and taking and converting his goods, wherein the plaintiff recovered, and the defendants appealed.

We find nothing in this record to authorize the maintenance of this action of trespass. It is the case of a seizure and sale of goods under execution, the sale being to a third person, the subsequent reversal on appeal of the judgment upon which the execution issued, and this suit, afterwards brought by the defendant against the plaintiffs in the execution, for the breaking and entering into premises and making such seizure and sale. The judgment under which the goods were taken was rendered by the Superior Court of Cook county on *cognovit*, and the reversal was by the Appellate Court for the First District, on appeal. The judgment was in due form of law, by a court of general jurisdiction having jurisdiction of the subject matter and of the person of the defendant, by the *cognovit* of his attorney, and the execution was fair and regular on its face, the sale under execution being to third persons,—innocent purchasers,—and the judgment not reversed until some six months afterward, for error. Such is the case which the record presents, and under such circumstances the law is well settled that trespass does not lie against the plaintiffs in execution. The acts were lawful when done, being under and by virtue of regular process of a court of competent jurisdiction. The reversal of the judgment did not have a retroactive effect, and make tortious that which, when done, was lawful. The judgment prior to the reversal was a sufficient justification to the plaintiffs therein for all acts done in enforcing it, for an erroneous judgment is the act of the court. After a reversal the defendant is entitled to restitution from the plaintiff of all obtained under the judgment. He may recover the money collected upon it as so much money had and received to his use, but there is no liability of the plaintiff as for a trespass for the goods seized and sold under the execution. Freeman on Judgments, sec. 482; *Bank of the United States* v. *Bank of Washington*, 6 Pet. 8; *McJilton* v. *Love*, 13 Ill. 494; *Camp* v. *Morgan*, 21 id. 257; *Bassett* v. *Bratton*, 86 id. 155.

It was said by COWEN, J., in *Clark* v. *Pinney*, 6 Cow. 300: "Trespass surely would not lie for collecting the amount of a judgment which was merely erroneous." The answer made for appellee is, that trespass is a proper remedy to recover damage done to the plaintiff under a void or irregular judgment or writ which has been set aside for that cause, and the averment is made that the judgment was set aside by the Appellate Court because, among other reasons, it was entered by the mere unauthorized act of the clerk of the Superior Court, in term time, without any judgment having been rendered by said court. Surely nothing of this appears by this record. The record shows a regularly entered judgment by the Superior Court, on appearance of the respective parties by their attorneys, and shows no motion in that court to set aside the judgment. All it shows of the action of the Appellate Court is, the mere judgment of reversal for manifest error appearing, and the remanding order. No other reason for the reversal appears than that it was for manifest error. All that the record shows is a reversal for error, with no intimation wherein the error consisted.

We are referred to the report of the case in 6 Bradw. 307, of the Appellate Court Reports, as giving the reasons for the reversal. That is entirely outside of this record, the record showing nothing whatever as to that report.

It follows that upon the showing by this record there was error in the giving and refusing of instructions based upon the theory that the judgment and execution were no justification.

The judgment of the Appellate Court is reversed, and the cause remanded.

Judgment reversed.

JOSEPH BOYD

v.

THE TOWN OF FARM RIDGE.

Filed at Ottawa June 21, 1883.

HIGHWAY—*penalty for continuing partial obstruction after notice.* The building of a fence upon a road, whether across the same or longitudinally with the road, is an obstruction thereof, within the meaning of section 58 of the Road law of 1874, and the person so obstructing is liable to the statutory penalty for suffering such fence to remain upon the road after being ordered to remove the same by the highway commissioners, although the penalty for the original obstruction may be barred by the Statute of Limitations.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of La Salle county; the Hon. GEORGE W. STIPP, Judge, presiding.

Messrs. BLANCHARD & BLANCHARD, for the appellant.

Messrs. MAYO & WIDMER, for the appellee.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

This is a prosecution against Joseph Boyd, the appellant, for neglecting and refusing to remove a fence built by him upon a public highway, after having been notified to do so by the proper authorities, as required by law. His liability for the original obstruction of the highway is barred by the Statute of Limitations, and it is claimed by his counsel the statutory liability for permitting an obstruction to remain after an order by the commissioners of highways to remove the same, has no application to a case like this, and this is really the only question in the case.

Section 58 of the Road and Bridge law provides: "If any person shall injure or obstruct a public road by falling a tree or trees in, upon or across the same, or by placing or leaving

any other obstruction thereon, or by encroaching upon the same with any fence, or by plowing or digging any ditch or other opening thereon, or by turning a current of water so as to saturate or wash the same, or shall leave the cuttings of any hedge thereon for more than five days, he shall forfeit for every such offence a sum not less than three dollars nor more than ten dollars, and in case of placing any obstruction on the highway, an additional sum of not exceeding three dollars per day for every day he shall suffer such obstruction to remain after he has been ordered to remove the same by any of the commissioners of highways, complaint to be made by any person feeling himself aggrieved." (Laws 1874, p. 921, Cothrans' Stat. p. 1318, Session Laws 1877.)

It is contended by counsel for appellant, that where a fence is constructed along a public highway, leaving a considerable portion of it unobstructed, as was the case here, it is, in the language of the statute, a mere *encroachment*, and not an *obstruction*, and hence it is concluded that appellant is not obnoxious to the additional penalty for permitting an *obstruction* to remain after notice by the commissioners of highways to remove it. As we understand counsel, it is conceded if appellant had built the fence across the road so as to obstruct travel altogether, he might properly have been convicted for neglecting to remove an obstruction, but that inasmuch as the fence only occupied a part of the road, and did not entirely obstruct travel, although it extended longitudinally over the road its entire length, it is claimed no liability attached for refusing to remove the fence after notice, on the ground it was a mere encroachment, and not an obstruction. We do not think this is a proper construction of the act. To hold so would be to make the liability of the accused depend, in every case of this kind, upon the direction or course of the fence with respect to the road, or upon whether its construction caused a total or partial obstruction of the highway, and we can not believe the legislature ever intended the guilt

or innocence of one prosecuted under the statute should be made to depend upon matters so inconsequential as these. The object of the act was to prevent all obstructions of highways, whether total or partial, and in specifically pointing out such as might be caused by the building of fences, it was to the legislature a matter of total indifference whether they might happen to be built along or across the highway, for in either case there would be an obstruction, and the failure to remove it, after notice, would render the party placing it there liable.

The judgment will be affirmed.

Judgment affirmed.

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THE ST. LOUIS BRIDGE COMPANY

v.

EDWARD P. CURTIS *et al.*

Filed at Mt. Vernon June 21, 1882.

1. DESCRIPTION—*of property conveyed by deed.* It is a rule of uniform application that to pass a thing granted it must be embraced in a general or specific description, and the description must be such as to distinguish it from all other things. The property may be identified by extraneous evidence, but the description in the grant can not be enlarged or restricted by such evidence. Where there is a general and a specific description, the latter must control.

2. Effect must be given to a deed according to the intention of the parties, as ascertained from the language they have used; but it is a well established rule of construction that when the description of the property intended to be conveyed includes several particulars, all of which are necessary to ascertain the land to be conveyed, no land will pass except such as will agree with the description in every particular.

3. Thus, where a deed describes the premises conveyed as a certain bridge, by its name, then in course of construction, together with the approaches thereto on both sides of the river, and being a strip fifty feet in width, describing such strip, together with all franchises and privileges held by the grantor company by its charter, the grant will be confined to the bridge itself,

the approaches thereto, and the company's franchises and privileges, and all other property owned by the grantor will be excluded, and will not pass.

4. A deed of trust by a bridge company described the property conveyed as the bridge named, "and also all and singular such pieces or parcels of land occupied by the railway track, culverts, bridges, trestles and other structures thereon, of such bridge company, as now are or hereafter shall be acquired by said party of the first part, for the purpose of laying thereon railway tracks, to connect or make junction between the railway tracks on said bridge and the railway track or tracks of any other corporation or corporations, person or persons, in or about East St. Louis, together with all and singular the tenements, hereditaments and appurtenances to several lots, strips, pieces and parcels of land belonging or of right appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all rights of way, easements, licenses and claims to or for the use and occupation of the same, and also all the estate, right, title, interest, property, possession, claims and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the above described premises, and every part and parcel thereof, with the appurtenances:" *Held*, that this description did not embrace land and lots of the bridge company not at the time or since occupied for the purposes named in the deed, or appropriated to such purposes then or since.

5. SAME—*words "tenements, hereditaments and appurtenances."* In such a conveyance the words "tenements, hereditaments and appurtenances," apply to the property previously described, and not to property not before enumerated, and the same is true of the reversions, remainders, rents, issues and profits, which words are expressly confined to the property before described.

6. SAME—*what passes as an appurtenance.* One piece of land held in fee, or by a lesser title, can not be appurtenant to another tract. Nothing can properly be appendant or appurtenant to anything, unless the principal or superior thing be of perpetual subsistence and continuance. An incorporeal hereditament or an easement may be an appurtenance, and pass as such by a grant of the principal to which it is appurtenant.

7. EASEMENT—*what constitutes.* An easement can only consist of the privilege upon or in the land of another, such as a right of way and the like. From its nature a person can never have an easement in his own land.

8. GRANT—*of franchise, does not carry tangible property.* The tangible property of a corporation does not pass as an incident or accession on the sale of the franchise.

APPEAL from the Circuit Court of St. Clair county; the Hon. AMOS WATTS, Judge, presiding.

Brief for the Appellant.

Messrs. G. & G. A. KOERNER, for the appellant:

The first three parcels of land in question were acquired by the old bridge company in 1869, by condemnation, they being assessed at $28,975. The condemnation proceedings being had previous to the constitution of 1870, were governed by the law then in force. *Peoria and Rock Island R. R. Co.* v. *Bickett*, 62 Ill. 332; *Emerson* v. *W. U. R. R. Co.* 75 id. 176.

Under the law then in force an absolute fee passed on payment of the damages assessed. Act 1852, sec. 1; Gross' Stat. p. 661, sec. 13.

The mortgages of 1870 and 1871, in terms, both covered future acquisitions of the company. The new acquisition can be an easement as well as a fee,—an incorporeal right, appurtenant to the principal thing, as well as an addition to it, or an enlargement of it. *Williams* v. *New Jersey Southern R. R. Co.* 29 N. J. Eq. 311; *Stevens* v. *Watson*, 4 Abbott, (N. Y.) 303.

That land and buildings may pass as appurtenances to other land, when necessary to the enjoyment of the principal land, see 2 Washburn on Real Estate, sec. 626, subdivision 36, (2d ed.) p. 668, and authorities there cited in note 4; *Smoking Valley R. R. Co.* v. *Livermore*, 47 Pa. St. 465.

A railway company having statutory authority to take land by condemnation for the purposes of their undertaking, may take sufficient to provide for future requirements which may be reasonably contemplated. And the fact that a portion of the land so taken is not immediately used for railway purposes, but is let on lease, is not conclusive evidence that such portion is superfluous land. L. R. 8 Exch. 294; L. R. 2 H. L. 27.

It does not matter that in acquiring the land the bridge company may have intended to devote it to a purpose other than that to which in fact it did apply it, provided that both

are corporate purposes. The actual use for any corporate purpose suffices. *Peoria R. R. Co.* v. *Railroad Co.* 66 Ill. 174.

In any case, the right of the complainant to an easement upon the parcels of land in question must be conceded. An easement would pass as an appurtenance. *Kuhlman* v. *Hecht*, 77 Ill. 570.

The covenants contained in the two original mortgages and supplemental deed, respecting future acquisitions and further assurances, passed to and vested in the plaintiff. *Phelps* v. *Kellogg*, 15 Ill. 131; *Dorsey* v. *St. Louis, Alton and Terre Haute R. R. Co.* 58 id. 65; *Sterling Hydraulic Co.* v. *Williams*, 66 id. 399.

Messrs. WILDERMAN & HAMILL, for the appellees:

The premises in question did not pass as appurtenant to the bridge and the lands on which it is situated. Land can not be appurtenant to land, or pass with it as belonging to it. *Gebhardt* v. *Reeves*, 75 Ill. 301; 2 Washburn on Real Prop. *626.

When a tract of land is granted by an accurate description, giving it a definite and limited boundary, another tract not mentioned in the deed will not pass as appurtenant to the tract thus described. *Gebhardt* v. *Reeves, supra; Chicago* v. *Rumsey*, 87 Ill. 348; *Wilcoxon* v. *McGhee*, 12 id. 381; *Harris* v. *Elliott*, 10 Pet. 54; *Jackson* v. *Hathaway*, 15 Johns. 454; *Leonard* v. *White*, 7 Pick. 6; *Grant* v. *Chase*, 17 Mass. 443; *Parsons* v. *Johnson*, 68 N. Y. 62; 2 Washburn on Real Prop. *626.

The terms used by the various conveyances to Humphreys and others, trustees, in describing the tracts and parcels of land conveyed by the various conveyances, are restrictive, and exclude from their operation the lots in question, and they did not pass. The maxim, *falsa demonstratio non nocet*, has no application. *Griscom* v. *Evens*, 40 N. J. L. 402; *Jack-*

son v. *Sill*, 11 Johns. 201; *Homer* v. *Homer*, 8 Ch. Div. 758; same case, 25 Eng. (Moak's ed.) 660; Broom's Legal Maxims, *562, *563, *570; *Jackson* v. *Harder*, 13 Johns. 531; *Jackson* v. *Clark*, 7 id. 218; *Farmers' Loan and Trust Co.* v. *Commercial Bank*, 11 Wis. 207; *Dinsmore* v. *Racine and Miss. R. R. Co.* 12 Wis. 649; *Dennison* v. *Holliday*, 38 E. L. & Eq. 529; Jones on Railroad Securities, sec. 126; *Slingsby* v. *Grainger*, 7 H. L. 273; *West* v. *Lawday*, 11 id. 375; *Pullin* v. *Pullin*, 3 Bing. 47; *Doe* v. *Lyford*, 4 M. & S. 550; *Hall* v. *Combes*, Cro. Eliz. 368; *Clay* v. *Barnaby*, 2 Rolle's Abr. 51; *Wilson* v. *Mount*, 3 Ves. Jr. 191; *Doe* v. *Bell*, 8 D. & E. 579; *Roe* v. *Vernon*, 5 East, 51; *Doe* v. *Parkin*, 5 Taunt. 321; *Barnard* v. *Martin*, 5 N. H. 536; *Allen* v. *Richards*, 5 Pick. 512; *Brown* v. *Saltonstall*, 3 Metc. 423.

The tangible property and franchise do not constitute and pass as an entire thing by a grant of the franchise. Jones on Railroad Securities, secs. 124, 125, 126, 168; *Sangamon and Morgan R. R. Co.* v. *Morgan Co.* 14 Ill. 163; *Dinsmore* v. *Racine and Miss. R. R. Co.* 12 Wis. 649; *Hunt* v. *Bullock*, 23 Ill. 320; *Titus* v. *Mabee*, 25 id. 257.

There are no facts shown in the case upon which to predicate a legal or equitable claim to an easement in the premises in controversy. *Morrison* v. *King*, 62 Ill. 30; Goddard on Easements, pp. 121–127; *Parsons* v. *Johnson*, 68 N. Y. 62; *Butterworth* v. *Crawford*, 46 N. Y. 353; *Grant* v. *Chase*, 17 Mass. 443; *Johnson* v. *Jordan*, 2 Metc. 234; *Fetters* v. *Humphreys*, 19 N. J. Eq. 471; *Barns* v. *Loach*, 4 Q. B. 494; 29 Eng. R. (Moak's ed.) 35.

MR. JUSTICE WALKER delivered the opinion of the Court:

This was a bill filed by appellant, to enjoin a sale of certain real estate situated in East St. Louis, under a deed of trust, and to have it declared a cloud on complainant's title.

The material facts of the case are, that the Illinois and St. Louis Bridge Company, after it had commenced erecting

the bridge, issued its bonds for money borrowed, and gave a deed of trust on the bridge and its approaches, right of way, etc., to secure the same. It, however, did not embrace the property involved in this controversy. Afterward, to secure another loan, the company executed another trust deed on the same property. On the 2d day of February, 1874, the company made a supplemental deed of trust to better secure the payment of the bonds, and to effectuate the purposes of the prior deeds of trust. This deed described the bridge and property embraced in the prior deeds, and included several other lots of ground particularly described, but it does not in terms embrace the property involved in this case. It contained a full description of the property named, and a covenant for further assurance. In the month of October, 1874, the bridge company, being indebted to the National Bank of Missouri in the sum of $52,548.83, executed a deed of trust to one Curtis, and conveyed to him the property in controversy, to secure its payment. The bank afterwards became insolvent, and its affairs were placed in the hands of defendant Johnson, as receiver, and the debt the deed of trust was given to secure not having been paid, Curtis, at the request of Johnson, advertised the property for sale, in pursuance of the powers contained in the trust deed, and complainant, claiming to have acquired the title and to be the owner, filed this bill to enjoin the sale, and to have the claim of appellee thereto declared invalid, and removed as a cloud on its title, and to have it quieted. The Illinois and St. Louis Bridge Company having failed to pay the bonds secured by the trust deeds, proceedings were instituted, and by a decree of court they were foreclosed, and the property sold, and purchased by one A. J. Thomas; and he, on the 9th day of March, 1879, conveyed the same to complainant, and it has been and now is in possession of the property thus sold. Defendants answered, and on the hearing evidence was heard, and the court dissolved the injunction and dismissed the bill,

and from that decree complainant appeals and urges a reversal.

These facts present the question whether appellant is the owner of the lots described in the bill. It is claimed on the one side that it is, and denied on the other. If the company holds title, it is through the deeds of trust and the master's sale under the decree of foreclosure, as title is claimed from no other source. It is not claimed that this property is described in the deeds of trust given to secure the bonds, by metes and bounds, by numbers, or by any other specific designation, but it is claimed that the description, especially in the supplemental deed, is sufficiently broad and comprehensive to embrace them, and, being so, the title passed to complainant. It is a rule of uniform application that to pass a thing granted it must be embraced in a general or specific description, and the description must be such as to distinguish it from all other things; but in identifying the property granted, it may be shown by extraneous evidence, but the description in the grant can not be enlarged or restricted by such evidence. When, as is generally true, there is a general and a specific description, the special description must control. When it is said in the deed that a grantor conveys a quarter section of land situated in a county and township named, this is the general description; but if taken alone it passes nothing, because there are many tracts within the boundaries named that would fully answer the description, and, not being distinguished from these other tracts, it could not be located, and nothing would pass by the deed. But when the description proceeds to further describe the tract as being in a particular section, and locates it in a specified part of the section, by the government surveys or by metes and bounds, this particular description distinguishes this particular tract from all others, and is complete. Effect must be given to the deed according to the intention of the parties, as ascertained from the language they have employed

to express that intention; and it is an admitted and well established rule of construction, that when the description of the property intended to be conveyed includes several particulars, all of which are necessary to ascertain the land to be conveyed, no land will pass except such as will agree with the description in every particular. Broom's Legal Maxims, (4th ed.) *497. This rule is found in the earliest English reports, and has been adopted by a multitude of modern decisions in both Great Britain and this country, nor has its correctness ever been challenged.

Tested by these rules, the property only specially described can be held to have passed by the first three trust deeds. The first and second trust deeds described the premises conveyed as the bridge then in course of construction, together with the approaches to the bridge on both sides of the river, and being a strip fifty feet in width (describing these strips), together with all franchises and privileges acquired by the company by its charters. This description confines the premises granted to the bridge itself, the approaches thereto, and its privileges and franchises. These are the only subjects named, and all others not named in the particular description must be excluded, and under the rule did not pass to the grantee.

But it is claimed that the supplemental deed enlarged the description so as to embrace the property in controversy. After describing the bridge, it contains this clause: "And also all and singular such other pieces or parcels of land *occupied by the railway tracks, culverts, bridges, trestles and other structures thereon of said bridge company*, as now are or hereafter shall be acquired by said party of the first part, for the purpose of laying thereon railway tracks to connect or make junction between the railway tracks on said bridge and the railway track or tracks of any other corporation or corporations, person or persons, in or about East St. Louis, together with all and singular the tenements, hereditaments and

appurtenances to said several lots, strip, pieces and parcels of land belonging or of right appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all rights of way, easements, licenses and claims to or for the use and occupation of the same, and also all the estate, right, title, interest, property, possession, claims and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the above described premises, and every part and parcel thereof, with the appurtenances." This description is not sufficiently comprehensive to embrace the property named in the bill, nor is there any other that does. It embraces all land occupied by the railroad tracks, culverts, bridges, trestles and other structures thereon, of the company, and the evidence shows that at that or at the present time none of the lots in controversy were or are occupied for any of the purposes named, and failing to fall within that description they must be excluded from it. Nor were these lots subsequently acquired for the purpose of laying tracks to connect with the tracks of other corporations. The company then owned these lots, nor has it ever appropriated them to such purposes, and the words "tenements, hereditaments and appurtenances" apply to the property previously described, and not to property not before enumerated. The language employed so limits them in express terms, and the same is true of the reversions, remainders, rents, issues and profits, as they are expressly confined to the property before described. This enlarged description does not in general or specific terms embrace this property, as it is nowhere in any manner described as intended to pass by any of these deeds.

But it is insisted that the lands passed as an easement, or as appurtenant to the bridge. There can be no plainer proposition than that one piece of land held in fee or lesser title can not be appurtenant to another piece of land. Lord Coke, in his Commentaries on Littleton, p. 121, sec. 184,

says: "A thing corporeal can not be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal, but things incorporeal, which lie in grant, * * * may be appendant to things corporeal." He further says, "that nothing can be properly appendant or appurtenant to anything unless the principal or superior thing be of perpetual subsistence and continuance. Land can not, therefore, be appurtenant to other land, but an incorporeal hereditament may. So of an easement, which is appurtenant." As to the first proposition, see *Cassell* v. *Buzard*, 6 Bing. 141, (8 Barn. & Cress. 150,) which announces the doctrine. The books abound in cases illustrating the rule. It then follows that the lots in controversy did not, and could not, pass as appurtenances to the conveyance of the bridge, its approaches, tracks, culverts, and connections with other roads, etc. Complainant therefore did not acquire title by that means.

It is said the lots described in the bill were used as an easement for the use of the bridge. An easement can only consist of a privilege upon or in the land of another, such as a right of way, and the like. From its nature a man can never have an easement in his own land. Having the exclusive and the whole uninterrupted right to its enjoyment, he can in no sense have an easement connected with it.

It is also claimed that the sale of the bridge and its approaches carried with it all property held by the bridge company. This is rebutted by the particular description of what was sold. But even if that were not so, unless it had been so stated in the grant it would not be embraced. This is the doctrine of this court, settled by a number of cases. It is held that the tangible property of a corporation does not pass as an incident or accession on the sale of the franchise. *Sangamon and Morgan R. R. Co.* v. *Morgan County*, 14 Ill. 163; *Hunt* v. *Bullock*, 23 id. 320; *Titus* v. *Mabee*, 25 id. 257. This doctrine is supported by the decisions of other courts, and it is based on reason and justice.

In any view in which the case has been presented, we are unable to perceive that appellant has any title to the property, whether in fee or by a lesser estate; and having no title to be clouded, the bill will not lie, and the court below decided correctly in dismissing the bill, and the decree of that court must be affirmed.

Decree affirmed.

THE MUTUAL UNION TELEGRAPH COMPANY

v.

ADOLPH KATKAMP.

Filed at Mt. Vernon June 21, 1882.

EMINENT DOMAIN—*of the damages for right of way for a telegraph line.* A telegraph company sought to condemn a strip of land eighteen inches wide and three feet deep every one hundred and fifty feet from the point of beginning, etc., of sufficient width to erect telegraph poles and fixtures thereon, the poles to be set along the line of the right of way of a railroad which was fenced, and the proof showed there would be eleven poles on defendant's land, which was worth $60 per acre. Three witnesses for the defendant testified that the damages would be $10 a pole, arising from their interfering with the use of farming implements, while three witnesses for the petitioner testified, one that fifty cents, and the other two that one dollar a pole, would be full compensation, and that when the poles pursued the line of the right of way of a railroad company, as in this case, in their judgment there could be no other damage than the value of the land taken. It also appeared that a strip of land six feet wide across the whole tract would be two-tenths of an acre, of the value of $12, at $60 an acre, and such a strip eighteen feet wide would be but six-tenths of an acre, and worth but $36. The jury, by their verdict, gave the defendant $38.50: *Held*, that the verdict was manifestly too high, and for this error the judgment was reversed.

APPEAL from the County Court of Madison county; the Hon. M. J. DALE, Judge, presiding.

Mr. A. W. HOPE, for the appellant.

Opinion of the Court.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a proceeding on the part of the Mutual Union Telegraph Company, under the Eminent Domain act of this State, to condemn a right of way for telegraph poles across the land of Adolph Katkamp, being described in the petition as a strip of land eighteen inches wide and three feet deep every one hundred and fifty feet from the point of beginning, etc., of sufficient width to erect telegraph poles and fixtures thereon. The damages were assessed at $38.50, and the company appealed to this court.

It appeared that the telegraph poles were to be set along the line of the right of way of the St. Louis, Jacksonville and Chicago railroad, one foot from such right of way line, that there would be eleven poles on defendant's land, and that his land was worth $60 per acre. The defendant himself testified that the land was worth $60 an acre; that the damage to him would be $10 a pole; that the land actually taken would not be worth much; that he thought the poles being upon the land would injure its sale, and interfere with the cultivation of the land by being in the way of the plows and machinery, and for farming purposes. Another witness testified that in his opinion defendant's damages would be $10 a pole; that he estimated the damage could arise from the poles interfering with the use of farming implements in cultivating the farm, and would prevent plowing as close to the railroad as if the poles were not there. A third witness testified to the damages being $10 a pole; that the poles would interfere with the cultivation of the land, and might break the plows and machinery used to cultivate the farm. This was all the testimony on the part of the defendant as to the value of the land, or as to damages. Three witnesses gave testimony on the part of the petitioner, one that fifty cents, the other two that one dollar a pole, would be full compensation to the land owner for putting up the poles on his land;

that when the poles pursue the line of the right of way of a railroad company, as in this case, in their judgment there could be no other damage than the value of the land taken.

It appears that a strip of land six feet wide, extending continuously across the whole tract of defendant's land, a quarter section, would be two-tenths of an acre of land, and of the value of $12, at $60 an acre; and such a strip, even eighteen feet wide, across the whole tract, would be but six-tenths of an acre of land, and worth but $36. This shows that the verdict of $38.50 is manifestly against the evidence. Had either one of such strips of land been taken absolutely, it is not perceived, from the evidence, what other damage would have been sustained. There is no pretence of any damage in addition to the land taken, other than interference with the cultivation of the remainder of the land. But, as it appears to us, there was the same interference in that respect from the line of fence of the railroad right of way, as there would be from the line of telegraph poles; that there would be no more difficulty in cultivating up to the telegraph poles than there was before in cultivating up to the fence, so that there would be no enhancement of damage in this respect from the erection of telegraph poles, if allowance of compensation were made for the land taken and used by the company. Testifying to amounts of damage, where there is no basis of damage, is of no value as evidence.

Regarding the verdict as clearly against the evidence, the judgment is reversed, and the cause remanded.

Judgment reversed.

THE ST. LOUIS TRANSFER COMPANY

v.

TIMOTHY CANTY.

Filed at Mt. Vernon June 21, 1882.

1. APPEAL—*directly from the trial court to this court.* This court has no jurisdiction of an appeal directly from the judgment of the circuit court, when the sole question presented is, whether the court erred in holding that a garnishee was not protected by a judgment of a justice of the peace disregarding the amount of the statutory exemption in case of wages due from an employer, the appeal presenting no question of the validity of a statute or construction of the constitution.

2. It is not sufficient to give this court jurisdiction of an appeal directly from the trial court, that counsel should claim in his brief that the claim was made below that a statute was not constitutionally enacted, and the record shows that by stipulation of the parties the journal of the House of Representatives of the session in which the law was enacted was agreed to be considered as a part of the record, when no point is made here as to the validity of the statute.

3. It is not enough for counsel merely to say the validity of the statute is involved, to give this court jurisdiction of an appeal direct from the trial court. The record must show that the validity of the statute is in good faith, and not simply pretendedly involved, to give jurisdiction on that ground.

APPEAL from the Circuit Court of St. Clair county; the Hon. GEORGE W. WALL, Judge, presiding.

Mr. S. M. BRECKINRIDGE, and Mr. M. F. WATTS, for the appellant.

Mr. L. H. HITE, and Mr. GEO. D. GREEN, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The sole question presented by this record is, whether the circuit court erred in adjudging that a garnishee was not protected by a judgment of a justice of the peace disregard-

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ing the amount of the statutory exemption in case of wages due from an employer. Clearly this presents no question of the validity of a statute or the construction of the constitution, and it is impossible that there can be any other ground upon which we are authorized to take jurisdiction by appeal directly from the circuit court, as this case is brought here.

Counsel for appellee assert that the claim was made below that the statute exempting $50 of the wages due laborers from garnishment was not constitutionally enacted, and the record shows that by stipulation of the parties the journal of the House of Representatives of the session at which that law was enacted was agreed to be considered as a part of the record, but no point is urged here by counsel for appellant to that effect. In their brief they expressly say that the question we have stated is the only question to be considered by the court.

It is not enough for counsel merely to say the validity of a statute is involved, to give us jurisdiction; for if that were the law, every case might be brought here upon a simple assertion of counsel, however absurd that assertion might be. The record must show that the validity of the statute is in good faith, and not simply pretendedly, involved, to give us jurisdiction on that ground.

This appeal must, therefore, be dismissed, and counsel will, if they desire, be allowed to withdraw record, abstracts and briefs, for the purpose of filing in the Appellate Court.

Appeal dismissed.

Syllabus. Statement of the case.

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THE LACLEDE BANK

v.

CHAUNCEY H. KEELER.

Filed at Mt. Vernon June 21, 1882.

1. ATTACHMENT—*equitable interest in land subject thereto.* Under the act of 1869, amendatory of the chapter of the Revised Statutes of 1845, entitled "Attachments," equitable interests in lands were made subject to attachment to the same extent as legal titles.

2. SAME—*interpleader—of the issues to be tried.* This amendment was intended to obviate the prior rulings of this court that equitable interests were not liable to attachment, but not to change the law as it then stood relating to the trial of issues made on interpleader by third parties claiming the property.

3. Where a third party interpleads in an action by attachment, claiming the land attached, and an issue is formed as to whether the debtor has an equitable interest subject to the writ, that issue should be submitted to a jury, and it is error for the court to refuse to submit it, or to exclude evidence tending to show such equitable interest in the debtor.

4. A third person filed an interpleader in an action by attachment, claiming to be the owner of the land attached. The attaching creditor replied that although the deed under which the claim was made was absolute in form, it was but a mortgage to secure the payment of $7756, and the land was worth $15,000, to which the claimant rejoined, denying that the deed was a mortgage. On the trial the claimant under the deed proved the execution of a deed from the grantee of the attachment debtor, when the plaintiff offered to prove that the deed from the debtor was in fact only a mortgage, made to secure $7756, and the value of the land, and also that claimant, when he received his deed from the grantee of the debtor, knew his grantor only held the title as a security for the debt named, and also knew of the levy of the writ when he took such deed, all of which evidence the court refused to admit: *Held*, that the court erred in rejecting the proposed evidence.

APPEAL from the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

This was an action brought in attachment by the Laclede Bank against Chauncey H. Keeler. The writ was levied upon a certain tract of land in St. Clair county. The St. Louis Carbon Works Company, at the first term, filed an inter-

pleader, setting up that it was the owner of the land levied upon; that July 1, 1881, Keeler, for a good and valuable consideration, sold and conveyed it to one H. A. Haeussler, and that the deed was recorded July 9, 1881, before the attachment was levied; that on September 9, 1881, Haeussler conveyed the same land to the interpleader, which is now used by it in carrying on its business, wherefore interpleader prays that the land may be released from the attachment. To this plea the plaintiff replied:

1. That the interpleader is a corporation of the State of Missouri, and has no right or franchise to take land in Illinois.

2. That there is no such corporation as the interpleader.

3. That the deed from Keeler to Haeussler was in fact a mortgage given to secure an indebtedness due from Keeler to Haeussler, and that Keeler had an equitable interest in the land at the time of the levy, of all which the interpleader had notice.

4. That the deed from Keeler to Haeussler was made for the purpose of hindering and delaying plaintiff, who was then a creditor of Keeler, as Haeussler well knew, and whereof the interpleader had notice.

The court sustained a demurrer to the first and fourth replications, and overruled the same as to the second and third. The plaintiff also filed a fifth replication, that the deed from Keeler to Haeussler was, when made and when the attachment was levied, a mortgage given to secure an indebtedness of $7756, due from Keeler to Haeussler, and that the land was worth $15,000, of all which interpleader had notice when it took its deed from Haeussler. A demurrer having been overruled as to the fifth replication, the interpleader rejoined as follows: "To the fifth replication, denying that such deed from Keeler was a mortgage, and averring that it was a deed absolute; also, a second rejoinder, denying the value of the land as alleged, and the fact it had notice of the character of Keeler's deed. To the third repli-

cation the rejoinder denied that Keeler's deed was a mortgage, and that Keeler had any equitable interest in the land, and that interpleader had notice as alleged."

The other material facts sufficiently appear in the opinion.

Mr. CHARLES W. THOMAS, for the appellant:

Section 29 of the Attachment act provides that any person, other than the defendant claiming the property attached, may interplead without giving bail, when a jury shall be called to try the right of property. This section was a part of the Attachment act of the revision of 1845, and when it became law, and until March 31, 1869, no equitable interest in land held or claimed by a defendant was liable to attachment. *Lowry* v. *Wright*, 15 Ill. 95; *West* v. *Schnebly*, 54 id. 523; *Farrar* v. *Payne*, 73 id. 82.

Under the law as it then stood nothing but the legal title to land could be inquired into upon the trial of issues made upon interplea in an attachment suit. (*City Ins. Co.* v. *Commercial Bank*, 68 Ill. 348.) But by the act of 1869, (Rev. Stat. chap. 11, sec. 8,) a debtor's equitable interest or estate in land was made liable to attachment. This renders the prior decisions under the former law nugatory. To allow the party holding the legal title to interplead, and not allow the creditor to show the debtor has an equitable interest subject to the levy, is to abrogate the law of 1869, which was never intended.

Mr. R. A. HALBERT, and Mr. C. F. NOETLING, for the interpleader:

Section 29 of the Attachment act, allowing a third person to interplead and claim property attached, extends to real estate attached. *City Ins. Co.* v. *Commercial Bank*, 68 Ill. 349; *Needham* v. *Clary*, 62 id. 344.

The only question which the court could try under the statute was, who was the owner of the land at the date of

the levy, and on this issue the court decided in favor of the party interpleading, as no title to said property could be shown in Keeler when the levy was made. Nothing but the legal title could be inquired into. *City Ins. Co.* v. *Commercial Bank*, 68 Ill. 348.

The levy was not upon any equitable interest of Keeler in the land, but the levy was upon the land as the absolute property of Keeler, and this the party interpleading proved it was not.

Mr. JUSTICE WALKER delivered the opinion of the Court:

The only question presented on this record is, whether, in an attachment suit, where land has been levied on, and a third party interpleads, setting up title, and there is a replication, though the deed is absolute in form, that it was intended to be and was but a mortgage, the court can try the issue, or must it be referred to a court of equity. The act of 1869, amendatory of the chapter entitled "Attachments," Rev. Stat. 1845, provides, that "such officer shall, without delay, execute such writ of attachment upon the lands, tenements, goods, chattels, rights, credits, moneys and effects of the debtor, or upon any lands or tenements in and to which such debtor has or may claim any equitable interest or title of sufficient value to satisfy the claim sworn to, with costs," etc. (Laws 1869, p. 355.) It is under this provision that the issue was made in this case.

Under the law as it stood in 1845, it was held that an equitable title or interest in lands was not the subject of attachment, (*May* v. *Baker*, 15 Ill. 89, and *Lowry* v. *Wright*, id. 96,) and such proceedings were held void when the defendant was not served with process. (*West* v. *Schnebly*, 54 Ill. 523.) The evident purpose of the amendment was to render equitable interests in lands subject to attachment to the same extent as legal titles. Of this there can be no question. And in adopting the amendment no

change was made in the law, as it then stood, by which the issues shall be tried and the equities settled and the property should be sold. The practice of interpleading where land is levied on under a writ of attachment, is recognized in the case of *Needham* v. *Clary*, 62 Ill. 344. The question in that case arose out of a levy on land under such a writ, and the practice was not challenged, nor is any reason perceived why a jury may not try the legal title to land on an issue made by interpleader as well as under an issue in ejectment. Whilst this is true as to legal titles, it is denied that such a mode of trial is applicable to settling equitable interests of the parties.

The question is then presented as to the mode in which the issue shall be tried. The statute in terms provides that when the issue is made on filing an interpleader, the court shall cause a jury to be impanelled to try the issue. Nor does the statute make any distinction between legal and equitable titles. It is peremptory that the issue shall be tried, and tried by a jury. Had the law-makers intended that in case a levy was made on an equitable interest in land, a trial should be had on a creditor's bill, it would have been so provided; or had it been intended that the equities should be settled by the judge, and not by a jury, such issues would have been excepted, and the judge been required to try them; and failing to so provide, we can not thwart the intention of the statute, but must enforce it as we find it.

It is claimed that the court should have rendered judgment for the sale of the land, notwithstanding the interpleader, and have left the parties, on a bill to be subsequently filed, to have settled the question whether the defendant held an equitable title to the land. This would be in violation of the requirements of the statute. Here the interpleader claimed that he held the legal title to the land; but the attaching creditor replied that although the deed was absolute in form, it was but a mortgage to secure the payment of $7756,

and the land was worth $15,000. To this replication the interpleader rejoined denying the averment that the deed of conveyance was a mortgage, and on this an issue was formed, and the case was submitted to the court for trial, plaintiff reserving the right to insist the court had no jurisdiction to try this issue. On the trial the claimant under the deed proved it was a corporation organized under the laws of Missouri, and the execution of the deed to it by defendant Haeussler, the grantee of Keeler, which was all the evidence heard in the case. But plaintiff offered to prove that the deed was in fact but a mortgage, made to secure $7756 due from Keeler to Haeussler, and the property was worth $15,000, and that the St. Louis Carbon Works Company, when it received the conveyance of the property from Haeussler, knew he only held it as a mortgage; but the court rejected the evidence, and refused to permit plaintiff to prove such facts. He also offered to prove that defendant in attachment, at the levy of the writ, had and claimed an equity of redemption in the premises, and the company had notice of such facts, and of the levy of the writ of attachment, when it received the deed from Haeussler mentioned in the plea; but the court rejected the evidence, and held plaintiff's only remedy was in equity. The court found that the land was not subject to the attachment, as shown by the interpleader, and quashed the writ, but rendered judgment against the defendant for the amount claimed in the affidavit praying the writ.

We have seen that an equitable interest in land is authorized to be levied on in attachment, and an interpleader may set up title by plea, and an issue formed and a jury impanelled to try the issue. Here an issue was formed to be tried whether this deed, although absolute in form, was not in fact a mortgage, and whether the claimant under the deed did not have notice of that fact, and that the levy had been made, when the purchase was made from Haeussler. This issue was simple and free from difficulty, and any jury was

competent to determine it on evidence adduced; and had the issue been submitted to a jury, it would have been error had the court rejected the evidence offered by plaintiff, and it was equally error for the court to refuse to hear and give due force to its weight.

In the case of *The City Insurance Co.* v. *Commercial Bank*, 68 Ill. 348, it was held that in a claim by an interpleader the court would not determine the equities of the creditors of an insolvent corporation, the assets of which were in the hands of a receiver, who were not parties to the attachment suit; but it was not held that the equitable rights of the interpleading receiver would not be determined. That case, therefore, in nowise conflicts with what we hold in this case, and for the error indicated the judgment of the court below is reversed.

Judgment reversed.

JOHN LEIBENGUT

v.

LOUISVILLE, NEW ALBANY AND ST. LOUIS RAILWAY COMPANY.

Filed at Mt. Vernon June 21, 1882.

1. EMINENT DOMAIN—*condemnation proceedings in vacation.* Under the statute relating to eminent domain, the circuit and county courts are always open for proceedings to condemn land for right of way, and when the summons is quashed the court may order an *alias* summons returnable in vacation, and when so issued and served ten days before the return day, the court will acquire jurisdiction to assess the compensation to be paid for the right of way.

2. SAME—*amending summons, when no error, though not proper.* Where a summons issued by the county court on an application to condemn land for right of way was made returnable before the county court on a day in vacation, and the court caused the same to be amended so as to read "returnable before the judge," instead of the court, but it was properly served as issued, it was *held*, that the amendment should not have been made, it having been properly made returnable in the first instance; but it was further *held*, that as the amendment worked no harm, it presented no ground to

reverse the judgment of the court. A summons in such case, returnable before a judge in vacation, means before the court of which he is judge.

APPEAL from the County Court of Jefferson county; the Hon. C. A. KELLAR, Judge, presiding.

Messrs. A. M. & WILLIAM H. GREEN, for the appellant.

Mr. S. F. CREWS, and Messrs. PATTON & WATSON, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

A single question is raised upon this record. The proceeding was for the purpose of condemning right of way for a railroad under the Eminent Domain act. Summons was issued returnable on the first day of the November term,—it being the 21st day of the month,—of the county court of Jefferson county. That writ, on motion of appellant's attorneys, was on the return day quashed by order of the court. The court then ordered the cause to be continued until Monday, December 5, at nine o'clock A. M., and that *alias* summons be issued returnable at that time. Summons was issued as directed, and returned properly served. This summons, as issued and served, was returnable before the county court, but, as subsequently amended, was made returnable before the county judge instead of the county court. Appellant made default, and the question is whether he is affected by the summons thus issued and served—in other words, is it sufficient service?

The application in such cases is directed to be made to the judge of the circuit or county court, either in vacation or term time. (Sec. 1, chap. 47, Rev. Stat. 1874.) And by the 5th section of the same act it is provided: "Causes may be heard by such judges in vacation as well as in term time, but no cause shall be heard earlier than ten days after service upon defendant, or upon due publication against non-residents." Unquestionably, therefore, it was competent for the

judge to hear the cause on the 5th day of December, although not in term time, and appellant, having had summons, notifying him when and where the cause would be heard, served upon him more than ten days before the 5th day of December, had all the notice required either by the letter or the spirit of the act. It is impossible that he could have been misled.

In *Bowman et al.* v. *Venice and Carondelet Ry. Co.* 101 Ill. 459, we held this proceeding, whether instituted in term time or in vacation, is, in fact, a proceeding in court, and that it is competent, where a proceeding has been commenced in term time, to permit an amended petition to be filed in vacation. It was said: "Under our statute the circuit and county courts are always open for proceedings of this character. The object of the legislature in so providing was to obviate delays detrimental to public interests, that often occur in legal proceedings when confined to term time. The only difference in proceeding in and out of term is, in the latter case the judge must fix a particular day for the hearing, and order a special jury, and when such jury has been summoned, if not subject to challenge on other grounds, it should serve in the trial of the cause; and whether the cause has been commenced in term time or vacation, we see no impropriety in the judge allowing such amendments to be made as are by law allowed," etc.

The summons here issued and served was entirely accurate, and appellant was bound to respond to it if he desired to make any defence, and not having done so, he is concluded by the judgment. The amendment of the summons should not have been made, but it does no harm, for since we hold that the authority to judges to hear such causes in vacation is but authority to the courts of which they are judges, to do so, it must follow that a summons returnable before a judge in vacation, means before the court of which he is judge.

We see no cause to disturb the judgment below, and it is therefore affirmed.

Judgment affirmed.

Syllabus.

THE PEOPLE, for use of Town of Highland

v.

CHARLES B. SUPPIGER *et al.*

Filed at Mt. Vernon June 21, 1882.

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1. JUDICIAL NOTICE—*as to location of incorporated town—counties under township organization.* This court will take judicial notice of the county in which an incorporated town is situated, and of the fact whether such county is under township organization.

2. ROAD LAW *of 1877—repealed.* The act of 1879 concerning "roads and bridges" is a revision of former laws on this subject, and in terms repeals the act of 1877, so far as it relates to counties under township organization, and also all other acts or parts of acts inconsistent therewith.

3. ROAD TAX—"ROAD AND BRIDGE TAX"—*how to be applied, respectively—under sections 16 and 119 of the act of 1879.* The tax levied by the commissioners of highways, not exceeding fifty cents on each one hundred dollars' worth of taxable property, under section 16 of the Road law of 1879, so far as it relates to property within incorporated villages, towns and cities in which the streets and alleys are under the care of the corporation, is required to be paid over to the treasurer of such village, town or city, to be appropriated to the improvement of the streets, alleys and bridges in such corporation.

4. But the "road and bridge tax" levied and collected under section 119 of the Road law of 1879, is a tax distinct from the road tax levied under section 16 of the same act, and the statute is imperative that such tax, including that collected on property within incorporated villages, towns and cities, shall be paid over, when collected, to the treasurer of the commissioners of highways, except the collector's commissions. The rule was different under the Road law of 1877.

5. The road and bridge tax required to be levied and collected by the commissioners of highways under section 119 of the Road law of 1879 is for certain specified purposes, such as for the making and repairing of bridges, the payment of damages by reason of the opening, altering and laying out of new roads, the purchasing of necessary tools, implements and machinery for working roads, etc., and is a distinct tax from that levied and assessed under section 16 of the same act. The first must be paid in money, while the road tax may be discharged in labor on the roads.

6. SAME—*former decision.* The words, "except as provided in section 16," contained in the former statute, and which were thought, in *Baird* v. *The People*, 83 Ill. 387, to make it the duty of the collector to pay the

"road and bridge" tax as well as the road tax proper, levied and assessed on property situated in villages, towns and cities, to the treasurers of such corporations, have been omitted from the revision of 1879, hence that case has no application under the law as now existing.

APPEAL from the Appellate Court for the Fourth District; —heard in that court on appeal from the Circuit Court of Madison county; the Hon. AMOS WATTS, Judge, presiding.

Messrs. KROME & HADLEY, for the appellants.

Messrs. METCALF & BRADSHAW, for the appellees.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

This is an action of debt, and was brought in the name of the People, for the use of the board of trustees of the town of Highland, on the official bond of Charles B. Suppiger, collector of the town of Helvetia, against such collector and his sureties. As the case was submitted in the circuit court on an agreed statement of facts, it will not be necessary to remark upon the pleadings.

This court will take judicial notice the town of Highland is situated in the county of Madison—a county under township organization. The town of Highland was made a municipal corporation by a special act of the legislature, passed in 1865, and is situated within the territorial limits of the town of Helvetia, a town under township organization. Section 12 of the charter of the town of Highland, which was given in evidence, provides it shall be the duty of the municipal authorities to keep all roads, streets, alleys and bridges in the corporate limits of the town, and for one mile beyond, in good repair, and for that purpose the authorities might require certain road labor to be performed, and the performance of such road labor should exempt the inhabitants of such town from the performance of any other road labor under the laws of the State. It is further provided, in the

same section, the road tax assessed upon the property in such corporation, and upon the property for one mile beyond its limits, shall be paid to the treasurer of the town of Highland, and that it may be collected in such manner as may be prescribed by ordinance.

It is admitted there was levied and assessed, in pursuance of law, for the year 1879, and subsequent to the 1st day of July of that year, upon all the taxable property of the town of Helvetia, what is known as a "road and bridge" tax, not exceeding forty cents on each one hundred dollars' worth of taxable property, and that the aggregate amount of such tax levied and assessed for that purpose, for the year mentioned, within the corporate limits of the town of Highland, was $1173.62, and that of that amount there came to the hands of the collector, before the commencement of this suit, $1092.40. It is stipulated the town of Highland has received from such collector the full amount of the road tax levied and collected for that year from property within the corporate limits of the town, but has received no part of the "road and bridge" tax so levied and collected. The treasurer of the highway commissioners of Helvetia township, and the treasurer of the town of Highland, both claim the "road and bridge" tax in the hands of the collector, and the only question raised and discussed is, which party is entitled to it.

The act of 1879, in force July 1 of that year, concerning "roads and bridges," is a revision of former laws on this subject, and in terms repeals the act of 1877, so far as it relates to counties under township organization, and also all other acts, or parts of acts, inconsistent therewith. It is plain, therefore, the present decision must be controlled by the act of 1879. Section 16 of that act provides, commissioners of highways may cause a tax, not exceeding forty cents on each one hundred dollars' worth of taxable property, to be levied and collected for road purposes, but the taxes levied for road purposes *only* on property lying within an

incorporated village, town or city in which the streets and alleys are under the care of the corporation, shall be paid over to the treasurer of such village, town or city, to be appropriated to the improvement of the streets, alleys and bridges in such corporation. As respects any tax that could be or was levied under this section of the statute by the commissioners of highways, there is no controversy. It is admitted the full amount of such tax has been fully paid by the township collector to the treasurer of the town of Highland.

But the contention is as to the "road and bridge" tax levied and assessed under the provisions of section 119 of the act of 1879. It will be observed the "road and bridge" tax is to be levied and collected for specific purposes, viz., for the making and repairing of bridges, the payment of damages by reason of opening, altering and laying out of new roads, the purchasing of necessary tools, implements and machinery for working roads, and other specific objects stated. This is a distinct tax from that levied and assessed under section 16 of the same act, and so this court decided in *Mee* v. *Paddock*, 83 Ill. 494. It will be observed that the tax levied under section 16 may be paid in labor by the party owing it, while that levied under section 119 is a money tax, and being for specific objects for which money is needed, it is obvious it must be collected in money. The statute is imperative (section 122) the "road and bridge" tax, when collected, shall be paid over to the treasurer of the commissioners of highways, by the collector, except such rate per cent as shall be allowed for collecting the same. As has been seen, all laws or parts of acts on this subject inconsistent with the act of 1879, have been expressly repealed, so that there is now no doubt as to whom the collector shall pay the "road and bridge" tax when collected. It must be paid to the treasurer of the commissioners of highways of the town imposing the tax.

The words, "except as provided in section 16," contained in the former statute, and which were thought in *Baird* v. *The People*, 83 Ill. 387, to make it the duty of the collector to pay the "road and bridge" as well as the road tax proper, levied and assessed on property situated in villages, towns and cities, to the treasurers of such corporations, have been omitted from the revision of 1879, hence that case can have no bearing on the present decision.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

MARY WHITE *et al.*

v.

JOHN WHITE, JR. *et al.*

Filed at Mt. Vernon June 21, 1882.

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1. CHANCERY—*affirmative relief on answer—necessity of cross-bill.* Affirmative relief can not be granted to a defendant in chancery upon his mere answer to the bill. To obtain such relief the defendant must file a cross-bill praying for the relief he seeks.

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2. Upon bill filed to reform a deed in respect to an alleged misdescription of the land intended to be conveyed, the defendant answered, admitting the mistake in the description of the land in the deed, but setting up another and different mistake—that it was intended to convey only a life estate in the land, whereas the deed purported to convey the fee. The evidence on the hearing tended strongly to support the answer, and the court below entered a decree setting the deed aside. It was held erroneous to grant such relief to the defendant in the absence of a cross-bill.

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3. SAME—*construction of a bill as to the character of relief sought.* The deed in which the misdescription occurred, purported to convey five acres off the east side of a certain quarter section, when the intention was to convey that number of acres off the east side of a forty acres of that quarter section. The bill prayed that the deed be corrected according to the facts, and that so far as it applied to the forty-acre tract not intended to be affected, the deed be for naught held, or that the error or mistake be corrected as the court might deem best, and for other and further relief. It was held this prayer

in the bill could not be construed as embracing the setting aside of the deed altogether, on the basis of the defendant's answer, and thus to obviate the necessity of a cross-bill. The prayer was for the correction of the deed by a further conveyance, in conformity with the facts charged in the bill.

WRIT OF ERROR to the Circuit Court of Perry county; the Hon. AMOS WATTS, Judge, presiding.

Mr. J. C. HAWTHORNE, for the plaintiffs in error:

Affirmative relief can not be granted to a defendant upon a simple answer without a cross-bill accompanying the same. *Tarleton* v. *Vietes*, 1 Gilm. 170; *Edwards* v. *Helm*, 4 Scam. 143; *McConnell* v. *Hodson*, 2 Gilm. 640; *Mason* v. *McGuire*, 28 Ill. 322; *McCagg* v. *Heacock*, 42 id. 135; *Hanna* v. *Ratekin*, 43 id. 462; *Titsworth* v. *Stout*, 49 id. 78; *Conwell et al.* v. *McCowan et al.* 53 id. 363; *Howett* v. *Selby*, 54 id. 151; *Purdy et ux.* v. *Henslee et al.* 97 id. 389.

It may be said that complainants in their bill prayed for a cancellation of the deed, but this is not so. They only asked to have the deed reformed so as to correspond with the real facts of the case, and that it be a nullity so far as it did not correspond with the real facts—that it still be the basis of a correct and true conveyance to be evolved therefrom.

Mr. J. R. MCFIE, for the defendants in error:

The decree setting aside the deed was in pursuance of the prayer of the bill. It prayed that the deed of John White, Jr., to John White, Sr., be cancelled. The decree cancels and annuls that deed. It grants no affirmative relief whatever, not asked by the complainants.

Mr. JUSTICE WALKER delivered the opinion of the Court:

Plaintiffs in error exhibited their bill in the Perry circuit court, to correct and reform a deed to five acres of land conveyed by John White, Jr., the patentee, to his father, John White, Sr. He conveyed it to Samuel White, who died, leav-

ing May White, his widow, and Eva White, his only child and heir. The bill alleges that John White, Jr., in conveying to his father, intended to convey five acres off the east side of the north-east quarter of the south-west quarter of section 6, township 4 south, range 4 west, in Perry county, but in drafting the deed a mistake was made, and it was described as being on the east side of that quarter section. The prayer of the bill was, that on a final hearing the deed from John White, Jr., to his father, be corrected according to the facts; that he be decreed and required to quitclaim the properly described lands; that the deed first made, so far as it applies to the south-east quarter of the south-west quarter of section 6, be for naught held, or that the error and mistake be corrected as the court may deem best, and for other and further relief. Defendant answered, admitting the mistake, but sets up another and different mistake, and that is, it was intended that John White, Jr., should convey to his father only a life estate in the five acres intended to be conveyed. The evidence on the hearing strongly tended to support the answer. To this answer a replication was filed, and on the hearing the court decreed that the deed be annulled, avoided and forever held for naught, and that complainants pay the costs.

Defendant having failed to file a cross-bill, it is urged that it was manifest error to grant specific relief to defendant on the answer—that under that state of the pleadings, according to the well recognized rules of practice, the court could do no more than dismiss the bill. According to the uniform practice of this and almost all courts of chancery, the court can never grant affirmative relief on the answer. To obtain such relief the defendant has the power to, and he must, file a cross-bill praying for the relief sought. This is the rule announced in *Tarleton* v. *Vietes*, 1 Gilm. 470, *Edwards* v. *Helm*, 4 Scam. 143, *McConnell* v. *Hodson*, 2 Gilm. 640, *Mason* v. *McGirr*, 28 Ill. 322, and *McCagg* v. *Heacock*, 42 id. 153, and a long list of other cases in this court might be

cited announcing the same rule. It is so plain and elementary as to require the citation of no authority for its support, as it is familiar to the entire profession. In this there was clear and fatal error. Nor has defendant attempted to distinguish this case from those cited, except he claims the decree was in accordance with the prayer of the bill. This is undeniably a misconception. The prayer is for a correction of the deed by a further conveyance, so as to conform to the facts as charged in the bill. It asks to have that part of the deed which embraces a portion of the other forty acres of the quarter to which they make no claim, declared void, and nothing more. To hold the prayer asks the entire deed be declared void, would violate every rule of construction.

It is said that the merits of the case require the affirmance of the decree, and to reverse it would be to enforce technicalities and to produce hardship. In the administration of justice some form must be observed, and there are rules of practice that must be observed, and the one under consideration is of that character. It is plain, simple, and easy of application, and when not observed by counsel, and it produces hardship, it is of his own procurement, and not that of the law, nor can it relieve against such omissions.

This error must reverse the decree, and renders it unnecessary to discuss the other questions raised and discussed. The decree of the court below is reversed, and the cause remanded.

Decree reversed.

Syllabus.

DELIA L. PAYNE *et al.*

v.

VALENTINE L. MILLER *et al.*

Filed at Mt. Vernon June 21, 1882.

1. FRAUDULENT CONVEYANCE—*settlement by husband on his wife.* A husband in failing circumstances had conveyed sixty acres of land, including his homestead, in satisfaction of prior loans of his wife to him of $1700, and being pressed by his creditors he procured a loan of $3000 on the land, and the wife gave up her conveyance, and joined in the mortgage to secure such loan, releasing her dower, in consideration that her husband would settle upon her twenty-three acres of the land, including their homestead, agreeing to sign any other deed or mortgage her husband might make to settle with his creditors. The husband, in pursuance of such arrangement, conveyed to her the tract of twenty-three acres, and it appeared that his indebtedness to her was ample consideration for the property conveyed to her above the amount of the homestead exemption: *Held*, that the conveyance to the wife was upon a sufficient consideration, and valid against the creditors of her husband.

2. SAME—*conveyance by husband to his wife.* A husband, though in failing circumstances, may make a conveyance to his wife, when it is made upon a full and fair consideration; and when such conveyances are made in good faith, they will be sustained to the extent of the consideration actually paid, and no further.

3. WITNESS—*competency of wife in relation to conveyance to her by her husband.* On creditor's bill to set aside a conveyance of land by a husband to his wife, she is a competent witness to prove the consideration of the conveyance, and its good faith.

4. SAME—*of attorney, as to matters coming to him as such.* An attorney at law may testify to facts coming to his knowledge while securing a debt of his client, in a contest between other parties than his client, the latter having no interest in the litigation.

WRIT OF ERROR to the Circuit Court of Madison county; the Hon. AMOS WATTS, Judge, presiding.

Messrs. IRWIN & SPRINGER, for the plaintiffs in error.

Messrs. METCALF & BRADSHAW, for the defendants in error.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

This was a creditor's bill, brought by Valentine Miller and Jacob Stoutzenberg, in the Madison circuit court, against Henry Payne, and Delia Payne, his wife, for the purpose of setting aside a post-nuptial conveyance made by him to her, and of subjecting the property conveyed to the payment of their respective judgments. Stoutzenberg and Payne have both died since the commencement of the suit, and their respective legal representatives have been substituted as parties. The circuit court found the equities with the complainants, and entered a decree in conformity with the prayer of the bill. Delia Payne and the legal representatives of her deceased husband bring the case here on error, and ask a reversal of that decree.

The whole controversy is narrowed down to a single inquiry, namely, whether the conveyance made by Payne to his wife on the 10th day of May, 1878, of a twenty-three acre tract of land constituting their homestead was fraudulent as against the creditors of the former, and the determination of this question depends entirely upon whether the evidence shows a sufficient consideration to support the deed.

It appears, from the testimony, that in 1863 and 1864 Mrs. Payne advanced or loaned her husband all together $500, and again in 1866 $1200, making a total of $1700, none of which was ever refunded to her. About a month before the conveyance in question, her husband, in consideration of this indebtedness, conveyed to her sixty acres of land, including the twenty-three acre homestead tract. At this time he seems to have been considerably involved, and struggling with his creditors as best he could. About this time, being pressed by his creditors, Payne applied to Thomas I. Barnsback for a loan of $3000, which the latter agreed to make provided Payne and his wife would join in a mortgage to secure its payment, and that something over $800 of the

amount should be paid W. W. Jarvis, one of Payne's creditors, the claim being then in the hands of John G. Irwin, as the attorney of Jarvis. On the 10th of May, Irwin, for the purpose of assisting in consummating the proposed loan from Barnsback, called at Payne's, having a mortgage already prepared for execution by Payne and his wife. Irwin testifies that the latter refused to sign the mortgage except upon the condition that Payne would settle on her the homestead tract in question, which he agreed to do, and that thereupon a deed was prepared by the witness which was executed by Payne to her at the same time he and his wife signed the mortgage. Irwin swears the consideration for the deed from Payne to his wife was the execution of the mortgage then given to Barnsback, and an agreement on her part to sign any other deed or mortgage Payne might make in order to effect a settlement with his creditors, and the proofs show that subsequent deeds were made by him in which she joined, for the purpose of relinquishing her dower. Mrs. Payne swears that the consideration for the conveyance to her was the relinquishment of her dower in all his lands, and the giving up of the deed for the sixty acres of land which he had conveyed to her about a month before in satisfaction of her claim against him for loaned money, as above stated. The testimony of these two witnesses relating to the consideration stands alone, and is uncontradicted, nor is there anything in the record that weakens or impairs its force. Assuming it to be competent, we think it quite clear the consideration was ample to cover so much of the property as is not included in the homestead, and there is no pretense that the homestead is subject to these claims.

We perceive no force in the objection that Mrs. Payne and Irwin were incompetent witnesses. As to the former, we think she falls within at least one, if not two, of the exceptions of the statute. The controversy relates to a tract of land standing in her own name, and the facts she testifies to go

to the very foundation of her right, and it is clear if she were a *feme sole* she would be a necessary party to any suit that might be brought to recover it. As to Irwin, he was acting, at the time to which his testimony relates, as the attorney of Jarvis, who has no perceivable interest in this litigation or the facts testified to by the witness. If this were a controversy between Jarvis and some one else, growing out of what occurred at that time, and Jarvis was here objecting to his testimony on the ground the facts testified to were acquired by him by reason of his employment as his attorney, there would be at least some apparent reason for the objection. But such is not the case. There is clearly nothing in the objection.

With respect to the right of a husband to make a conveyance to his wife, when in failing circumstances, the law is well settled he may do so when made upon a full, fair consideration, and where such conveyances are made in good faith they will be sustained to the extent of the consideration actually paid, and no farther. In the present case we think, as already stated, the consideration was ample. *Patrick* v. *Patrick*, 77 Ill. 555.

The decree of the circuit court will be reversed, with costs, and a decree entered in this court dismissing the complainants' bill.

Decree reversed.

EDWIN DAVIS

v.

HENRY C. MOORE.

Filed at Mt. Vernon June 21, 1882.

1. JUDICIAL SALES—*sale after defendant's death.* Where an execution is issued and levied upon real estate in the lifetime of the defendant therein, a sale after his death will be valid without any notice to his legal representative or revivor by *scire facias.*

Statement of the case.

2. At common law, if a defendant died after judgment against him, no execution could be issued, but the judgment had to be revived by *scire facias;* but by the statute an execution is authorized to be issued against the real estate of a deceased defendant, upon notice to his legal representative, after the expiration of one year from his death, without reviving the judgment or decree. This remedy is concurrent with the common law proceeding by *scire facias.*

3. SAME—*statute relating to sales, after defendant's death, construed.* Section 39, of chapter 77, Rev. Stat. 1874, provides that when a person shall die after a judgment or decree for the payment of money against him shall have been obtained in a court of record, execution may issue against his real estate, or a sale may be made under such decree or judgment, without reviving the same against his heirs or legal representatives, "*provided*, that no execution shall issue or sale be made until after the expiration of twelve months from the death of such deceased person; nor shall any sale be had on any *such* execution or decree until the person in whose favor the judgment or decree is sought to be enforced shall give to the executor or administrator, etc., at least three months' notice in writing of the existence of such judgment or decree before issuing execution or proceeding to sell:" *Held*, this provision has no reference to cases in which execution is issued and levied in the lifetime of the defendant in execution. The proviso relates only to executions to be issued after the death of the defendant, and sales on decrees not carried into effect in the lifetime of the defendant.

4. SAME—*sale after return day is valid, if levy is made before.* Where an execution is levied upon real estate in its lifetime, the officer may sell the land after, as well as before, the return day of the writ, without the issuing of a *venditioni exponas.*

5. SAME—*purchaser at execution sale—as to equities between the parties.* A purchaser of land at a sheriff's sale on execution, who is not a party to the judgment, need not concern himself in regard to any equities between the parties,—he is only bound to look to the judgment, the levy and the sheriff's deed, for the protection of his title.

APPEAL from the Circuit Court of Marion county; the Hon. GEORGE W. WALL, Judge, presiding.

This was an action of ejectment, brought by the appellee against the appellant, in the circuit court of Marion county. The record showed that William Aird was the common source of title under whom both parties claimed title, the defendant claiming under a sale made on a deed of trust given by Aird, and the plaintiff under a sale of the same land on execution against Aird, issued upon a decree of the Marion circuit court.

Mr. J. H. SEDGWICK, Mr. O. J. BAILEY, and Mr. WILLIAM WALKER, for the appellant.

Mr. HENRY C. GOODNOW, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Execution was issued upon a judgment of a circuit court, and levied upon real estate, in the lifetime of the defendant in execution. This real estate was sold, by virtue of that levy, within less than two months after the death of the defendant in execution, and without giving his executor, administrator or heirs any notice in writing of the existence of the judgment on which the execution was issued. The question is, was such sale void, or did it confer upon the purchaser a legal title, subject, of course, to the right of redemption?

Appellant claims that the sale was absolutely void, by virtue of section 39, chap. 77, Rev. Stat. 1874, p. 626, which reads as follows: "When a person shall die after the rendition of a judgment or decree for the payment of money against him is obtained in a court of record, execution may issue against the real estate of such deceased person, or sale may be made under such decree without reviving the judgment or decree against his heirs or legal representatives: *Provided*, that no execution shall issue or sale be made until after the expiration of twelve months from the death of such deceased person; nor shall any sale be had on any such execution or decree until the person in whose favor the judgment or decree is sought to be enforced shall give to the executor or administrator, or if there is neither, the heirs of the deceased, at least three months' notice in writing of the existence of such judgment or decree, before issuing execution or proceeding to sell." But this, it is clear, has no reference to cases in which execution is issued and levied in the lifetime of the defendant in execution. It has reference to judgments and

decrees which, after the death of the defendant in execution, it would, at common law, have been necessary to have revived by *scire facias* before their collection could be enforced. "By the common law all proceedings in a suit at law were arrested by the death of the parties. If either of them died before judgment, no judgment could be entered, but the suit abated; if he died after judgment, no execution could be issued, but the judgment had to be revived by *scire facias*." *Brown* v. *Parker*, 15 Ill. 307. Hence the language here is: "When a person shall die after the rendition of a judgment or decree for the payment of money against him is obtained in a court of record, execution may issue against the real estate of such deceased person, or sale may be made under such decree, without reviving" (as otherwise would be necessary) "the judgment or decree against his heirs or legal representatives." And the remedy thus provided is concurrent with the common law proceeding by *scire facias*. *Brown* v. *Parker*, *supra*.

The *proviso*, that "no execution shall issue or sale be made," by the plainest rules of construction relates only to the executions and sales which form the subject of the enactment,—that is to say, executions to be issued after the death of the defendant in execution, and sales on decrees for the payment of money, not carried into effect in the lifetime of the defendant. And this, in our opinion, is placed beyond reasonable controversy by the further clause, "nor shall any sale be had on any *such* execution or decree, until," etc., thus unmistakably referring back, for its antecedents, to the first named executions and decrees.

Where an execution is levied upon real estate, in its lifetime, there remains only the duty of the officer to sell, and this he may do after as well as before the return day of the writ, and without the issuing of a *venditioni exponas*. *Phillips et al.* v. *Dana*, 3 Scam. 551; *Bellingall* v. *Duncan et al.* 3 Gilm. 477. Here, when the defendant in execution died,

there remained, then, only the duty of the sheriff to sell,—a duty fixed or determined by the levy already made, and to the performance of which the further possession of the execution was unnecessary. No new process could be necessary, and the case is clearly unaffected by the statute.

We think the sale was valid. The equities talked of by counsel, in their brief, seem to be thrown in as makeweights or excuses for relying on strictly legal rights, rather than as constituting a legal defence to appellee's cause of action, and hence deserve no special notice. The judgment, the levy and the deed are shown, and these are all to which the appellee (who was not a party to the judgment) is required to look. *Phillips et al.* v. *Coffee*, 17 Ill. 154.

An objection was urged in argument that the judgment did not determine the estate of the appellee in the premises. This is a misapprehension. The record is not defective in that regard.

We perceive no cause to disturb the judgment below, and it will, therefore, be affirmed.

Judgment affirmed.

ADOLPH RUEGGER *et al.*

v.

THE INDIANAPOLIS AND ST. LOUIS RAILROAD COMPANY.

*Filed at Mt. Vernon January 16, 1882—Re-filed June 21, 1882.**

1. FORMER ADJUDICATION—*when a bar to relief, or relief on new ground.* Where the same matters involved in a suit in equity were involved in a prior suit, though in the United States Circuit Court, and the two suits were between the same parties, the decision in the prior suit will be conclusive on the trial of the second suit brought in the State court.

* Subsequently to the filing of the opinion in this case, in January, 1882, a rehearing was granted, but upon further consideration the opinion was re-filed as the opinion of the court.

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2. Where a suit is brought in the United States Circuit Court to enjoin the collection of a certain tax for certain years, which relief is denied on a final hearing on the merits, and the bill dismissed, this will be a bar to a bill filed by the same complainant against the collectors of the same counties, seeking the same identical relief, although other reasons and grounds may be alleged in the second suit for granting the same. A prior adjudication between the same parties is conclusive upon them, not only as to the matters actually determined, but as to every other thing within the knowledge of the parties which might have been set up as a ground for relief or defence.

WRIT OF ERROR to the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Messrs. WISE & DAVIS, for the plaintiffs in error:

A former adjudication by a court of competent jurisdiction is conclusive in any subsequent suit between the same parties for the same subject matter. *Hamilton* v. *Quimby et al.* 46 Ill. 90; *Rogers* v. *Higgins et al.* 57 id. 244; *Kelly et al.* v. *Donlin et al.* 70 id. 378; *Garrick et al.* v. *Chamberlain et al.* 97 id. 620.

Mr. JOHN T. DYE, for the defendant in error.

Mr. CHIEF JUSTICE CRAIG* delivered the opinion of the Court:

This was a bill in equity, brought by the Indianapolis and St. Louis Railroad Company, on the 22d day of June, 1878, against the collectors of the several counties of Madison, St. Clair, Macoupin, Montgomery, Christian, Shelby, Moultrie, Coles and Edgar, to enjoin them from levying upon and selling the rolling stock and personal property of complainant, by virtue of tax warrants issued to them by the clerks of the various counties, to collect certain taxes assessed by the State Board of Equalization upon capital stock for the years 1873, 1874, 1875 and 1876.

In the bill, as originally filed, it is alleged that complainant is a corporation organized and existing solely under the

*At the time of filing this opinion originally, Mr. JUSTICE CRAIG was Chief Justice.

laws of Indiana; that it became incorporated under the laws of that State by articles of association entered into on the 28th of August, 1867; that complainant's general offices are now, and always have been, in Indianapolis, Indiana; that it never became incorporated under any law of Illinois, general or special, or in any manner accepted or recognized any act of the General Assembly of Illinois in regard to complainant, or consolidated its capital stock or franchises with any corporation organized under the laws of Illinois; that it never did, and does not now, own, control or use any capital stock in Illinois, and owns, controls and uses no capital stock except that issued and held by it in Indiana, and uses and controls no franchises other than those granted by Indiana, except as lessees, and has not now, and never had, any indebtedness in Illinois, except for current expenses; that the State Board of Equalization of Illinois, at its first session, in August, 1873, adopted the following rule for the assessment of capital stock, including the franchises of railroad companies created under the laws of Illinois, (setting out said rule *in hæc verba*,) which is the only rule ever adopted by said board for said purpose; that said board, at each of its sessions in 1873, 1874, 1875 and 1876, wrongfully, fraudulently, and without authority of law, assessed the complainant on capital stock and franchise in Illinois, as follows: for the year 1873 the sum of $2,919,184, for the year 1874 the sum of $1,125,139, for 1875 the sum of $1,004,416, and for 1876 the sum of $375,326; that the board, after fixing the value, distributed the same for taxation among the counties on the lines of its road, and fixed the tax thereon (the amount for each year in each county is fully set out); that the board, although well knowing complainant owned, etc., no capital stock, and had no indebtedness in Illinois except for current expenses, applied said rule to complainant as if it was a corporation organized under the laws of Illinois; that said tax is fraudulent and void

because complainant had no capital stock or indebtedness in Illinois; that complainant is a common carrier of passengers and freight, and that in the performance of its duties as such it is necessary for its rolling stock to cross from Indiana into Illinois, but that the *situs* or location of said rolling stock is in Indiana; that it possesses all of said rolling stock as a corporation of Indiana; that said rolling stock is all listed and taxed in that State, and all the taxes thereon in that State have been fully paid by complainant.

On the 9th of December, 1880, complainant by leave filed an amendment to its bill, whereby it is alleged the State Board of Equalization of Illinois assessed the capital stock of the St. Louis, Alton and Terre Haute Railroad Company, for 1873, at $2,919,184; that said St. Louis, Alton and Terre Haute Railroad Company is a corporation of Illinois, owning a railroad extending from Terre Haute, Indiana, to East St. Louis, Illinois; that complainant is a corporation of Indiana, owning a railroad extending from Indianapolis to Terre Haute, in said State; that complainant, by virtue of a lease from the St. Louis, Alton and Terre Haute Railroad Company, has the right to use its rolling stock and machinery on the railroad of said railroad company, for which it pays a rental fixed by said lease, but that complainant owns no railroad in Illinois, and has no capital stock or bonded debt in said State; that the capital stock tax aforesaid is in addition to the tax on real estate and tangible property of said railroad company; that the aggregate amount of said capital stock for the year 1873 was distributed by the secretary of said board, and certified by the Auditor to the clerks of said counties as an assessment against the St. Louis, Alton and Terre Haute Railroad Company, and was not assessed by said State board or certified to said clerks as an assessment of the property of complainant, and is no lien upon its property, and complainant is not bound to pay taxes on said assessment; yet the defendants, to-wit, Adolph Ruegger,

collector of Madison county, (and the others, naming them,) by virtue of warrants issued to them as collectors by said county clerks, are about to levy and sell complainant's rolling stock and personal property used by it upon its leased line in Illinois.

The answer admits that complainant was originally a corporation of Indiana, with its general offices there, as alleged in the bill, but avers that on September 15, 1867, complainant, by written contract recorded, etc., leased from the St. Louis, Alton and Terre Haute Railroad Company, an Illinois corporation, certain lines of railroad and appurtenances in Illinois, which have been held and maintained by complainant ever since; that by an act of the General Assembly of Illinois, entitled "An act relating to the Indianapolis and St. Louis Railroad Company, and to authorize extension of said railroad," approved March 10, 1869, it was enacted as follows: (setting out the act *in hæc verba.*) Section 1 of said act confirms the lease aforesaid, according to its terms. Section 2 provides that the lessees (complainant), etc., shall be a railroad corporation in this State, under the style of "The Indianapolis and St. Louis Railroad Company," and shall possess the same or as large power as the lessors, and such other powers as are usual to railroad corporations, and authorizes complainant to extend said railroad. (Private laws 1869, vol. 3, p. 316.) That, as defendants are informed and believe, complainant accepted and acted under said act, and thereby became, and has ever since continued to be in this State, a corporation created and existing under the laws of Illinois, and has ever since held and operated said leased lines; that by the terms of the lease complainant was, during the term thereof, to pay all taxes, assessments and imposts, of whatever kind, which should be charged, levied, assessed or imposed upon said leased road, or that might be charged against the lessees by reason of its ownership of said road; that in pursuance of the assessment of the

State board there was distributed, as capital stock assessment of the St. Louis, Alton and Terre Haute Railroad Company, for 1873, 1874, 1875 and 1876, the sums of money mentioned in the bill; that the taxes so levied were, in pursuance of said lease, charged to complainant, but were not levied as a tax on the capital stock of complainant.

The answer further states, that as to said taxes for 1873, 1874 and 1875, complainant filed its bill in the United States Circuit Court for the Southern District of Illinois, on the 20th of July, 1876, against James L. Vance and others, being the several collectors of the counties aforesaid, impleaded with John Fishback, collector of the city of Alton, in which bill complainant stated it was a corporation of Indiana, and a citizen thereof, with its general offices in Indianapolis, and made an exhibit of its articles of incorporation, as herein, and stated that on September 11, 1867, it leased of the St. Louis, Alton and Terre Haute Railroad Company its line of railroad in Illinois, as described in said lease, and that it held and operated said line under said lease from the date thereof to the filing of said bill, and stating in said bill that it returned to the Auditor correct schedules of its property in Illinois, in said years 1873, 1874 and 1875; that the State board convened in each of said years, and assessed against complainant, as capital stock for said years, the several sums heretofore set out in the bill in this suit; that said assessment was unjust, illegal and void; that said sums had been certified to the county clerks, who had extended the taxes thereon against complainant, and placed warrants in the hands of the collectors of said counties, who threatened to levy, etc., concluding with a prayer for injunction, etc.

It was also alleged in the answer that an injunction was granted; that the defendants in the suit answered the bill, setting up the same matters in defence hereinbefore stated in this answer; that the complainant in the bill afterwards filed an amendment to the bill, and therein set out the act of

1869, and alleged that no person connected with complainant ever organized, subscribed for stock, or did any other act to incorporate under said act, and that no capital stock of the corporation referred to in said act was ever subscribed by the lessees referred to in said lease and act, and that all the capital stock owned by complainant was that subscribed to and issued by complainant, a corporation existing under the laws of Indiana.

The answer further sets up that upon a final hearing a decree was rendered, in which the bill was dismissed at complainant's costs; that an appeal was taken to the Supreme Court of the United States, and the decree affirmed. It is also set up in the answer that as to the tax of 1876 a like bill was filed, answer put in, and a decision rendered thereon as in the other case.

After an amendment was made by complainant to the bill in 1880, defendants filed an answer to the same, in which it was in substance set up that the State board assessed the capital stock of the St. Louis, Alton and Terre Haute Railroad Company for 1873, as alleged in the amended bill; that said railroad company is an Illinois corporation; neither admits nor denies that complainant is an Indiana corporation, as alleged in the amended bill, but avers that complainant is a corporation incorporated under the act of March 10, 1869, and is a corporation of Illinois, and accepted and acted under said act; admits complainant is operating said line of railroad by virtue of the lease aforesaid, but avers that in and by said lease complainant covenanted to pay the taxes, etc., during the term thereof, etc.; admits the aggregate amount of the capital stock of the St. Louis, Alton and Terre Haute Railroad Company for 1873 was distributed by the secretary of the board, and certified by the Auditor as an assessment against said railroad company, but avers the taxes extended thereon were charged to complainant in pursuance of the terms of said lease; admits said capital stock

was not assessed against complainant, but avers the taxes are a lien upon the complainant's property by virtue of the law and the lease aforesaid.

There is but one question presented by this record which it will be necessary to consider, as the determination of that fully settles the rights of the parties. That question is, whether the decree dismissing complainant's bill in the Circuit Court of the United States for the Southern District of Illinois, and affirmed in the Supreme Court, is a bar to a recovery here. If the same matters were involved in that case as are involved in this, and the transactions were between the same parties, the decision must be held conclusive. This principle is so well and fully settled that we deem it necessary to cite but few authorities in support of the rule.

In *Hamilton* v. *Quimby*, 46 Ill. 90, it was held that a former adjudication of the matter in controversy is conclusive between the same parties in a subsequent proceeding upon the same matter, not only as to the matters actually determined, but as to every other thing then within the knowledge of the complainant which might have been then set up as ground for relief, and litigated in the first suit.

In *Rogers* v. *Higgins*, 57 Ill. 244, it was held: "When a complainant in chancery presents his cause of action before the court, he should bring forward and urge all the reasons which then existed for its support. After a determination of the suit the controversy can not be reopened to hear any additional reason which before existed and was within the knowledge of the party, in support of the same cause of action. The principle of *res judicata* embraces not only what has actually been determined in the former suit, but also extends to any other matter properly involved, and which might have been raised and determined in it." See, also, *Kelly* v. *Donlin*, 70 Ill. 378, and *Garrick* v. *Chamberlain*, 97 id. 620.

As to the rule of law there can be no doubt. It then only remains to be determined whether the action set up in the answer was between the same parties, and involved the same matters that are involved in this action. The complainant in each case was the Indianapolis and St. Louis Railroad Company. The defendants were the same, the bill in the Circuit Court of the United States, as here, having been brought against the collectors of certain counties through which the railroad was constructed. The parties to the two bills may then be regarded as identical.

The only point upon which there is room for dispute, is in regard to the matters involved. The transcript of the proceedings in the case in the United States Court was read in evidence, and the decision of the case is reported,—*Railroad Company* v. *Vance*, 6 Otto, 450. From an inspection of the evidence it is apparent that the subject matter of each bill is the same. Each bill was brought for the purpose of enjoining the collection of a capital stock tax assessed by the State board for the years 1873, 1874, 1875 and 1876, upon the capital stock and franchises of the St. Louis, Alton and Terre Haute Railroad Company. The tax in each case which the railroad company sought to defeat was one and the same.

But it is said by counsel for the railroad company, that the issues involved in the case of *Indianapolis and St. Louis Railroad Co.* v. *Vance* were different from the issues involved in this case. In that case the bill sought to enjoin the collection of capital stock taxes against the complainant,—that is, the Indianapolis and St. Louis Railroad Company. In this case the bill seeks to enjoin the collection of capital stock taxes assessed against another corporation,—that is, against the St. Louis, Alton and Terre Haute Railroad Company. We do not regard this point well taken. The taxes sought to be defeated are the same in each suit. The testimony offered in each case shows but one assessment,—one valuation for the same years,—the same tax schedules, and

the same identical tax in question in each case. It is true a reason is urged to defeat the tax in this case which was not urged in the other case, but that can not affect the question. The court, in the case in the Circuit Court of the United States, had jurisdiction of the parties and the subject matter, and the complainant was bound to bring forward every objection that existed to the validity of the tax, and if he failed to do so he can not, in a subsequent suit, urge an objection which he might have insisted upon in the former action. Litigation must have a termination, and when a matter has been in issue, and the parties before the court, and opportunity afforded to assert their rights, they must be held concluded from afterwards litigating them in another proceeding. *Briscoe* v. *Lloyd*, 64 Ill. 33.

It is not, however, clear that the point now relied upon was not before the court in the *Vance case*. The court, in the opinion in that case, says: "The defendants, denying that there had been any assessment upon the capital stock of the complainant, insisted that the taxes in question were due upon assessments rightfully made by the State Board of Equalization of Illinois upon the capital stock and franchises of an Illinois corporation, the St. Louis, Alton and Terre Haute Railroad Company, over and above its tangible property, for so much of its main line and the Alton branch thereof as were leased to, and operated in Illinois by, the Indianapolis and St. Louis Railroad Company, to whom defendants claimed the taxes in question were therefore properly charged." *Railroad* v. *Vance*, 6 Otto, 450.

It is true the complainant alleged in the bill that the assessment was made against the complainant; but that was expressly denied, and it was insisted that the assessment was made against the St. Louis, Alton and Terre Haute Railroad Company, and, as we understand the decision, the court held that in fact the assessment was made against the St. Louis, Alton and Terre Haute Company, but that

the taxes due upon such assessment were properly charged to complainant, under the act of 1869, and the lease under which it operated the road. The court say: "The State board therefore made an assessment upon the capital stock of the lessor corporation (the St. Louis, Alton and Terre Haute Railroad Company) for that portion of the lines of railroad which passed from its control in virtue of the lease of 1867, and then distributed such assessment among the various counties on the lines of the leased railroads, in the proportion that the extent of track in the respective counties bore to the whole length of the leased lines in the State, the taxes due upon such assessment being charged to, and to be collected from, the Indianapolis and St. Louis Railroad Company, which, with the consent of the State of Illinois, as expressed in the act of March 11, 1869, was entitled to have and did have exclusive control and management of such leased lines. The mode thus adopted by the State board was, as we think, in substantial conformity to the laws of Illinois, and affords the complainant no just ground of objection." From this language of the court it is apparent that the manner in which the assessment was made was before the court, and fully passed upon; and the fact that complainant in the case had alleged that the assessment was made against it, instead of alleging, as here, that it was made against the lessor corporation, cut no figure in the case. We are satisfied the decree in the Circuit Court of the United States, as affirmed in the Supreme Court, is a bar to any relief here.

The decree of the circuit court will be reversed and the cause remanded.

Decree reversed.

Syllabus. Brief for the Appellant.

THE WORKINGMEN'S BANKING COMPANY

v.

HENRIETTA RAUTENBERG, Admx.

Filed at Mt. Vernon June 21, 1882.

1. CONTRACT—*legality—indebtedness of director of a bank in excess of limit in charter—guaranty.* Where a bank charter contains a clause that no director of the corporation shall be indebted to it, either directly or indirectly, at any time, to an amount greater than seventy-five per cent of the capital stock held by him in good faith as his own, and a director has become indebted to the bank in excess of such sum, a note given by him to the bank for a further sum will be illegal and void, and any guaranty of a third person of its payment, being in aid and furtherance of such illegal contract, will be equally void, and no recovery can be had upon such guaranty, although the guarantor is not a director.

2. SAME—*courts will not assist either party to an illegal contract.* The rule is well settled in this State that the court will not assist either party to an illegal transaction in any respect, but will leave them in the position they have voluntarily and knowingly placed themselves. In such case the maxim "*ex turpi causa non oritur actio,*" applies.

APPEAL from the Appellate Court for the Fourth District; —heard in that court on appeal from the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Messrs. HAY & KNISPEL, for the appellant:

A prohibition in a bank charter forbidding a loan to be made to an officer or director of a bank, does not render the contract whereby such loan is made, null and void. Such prohibitory clauses are regarded as directory merely. The breach of such a provision may subject the corporation to penalties at the process of the State authorities, but it does not avoid the contract which it affects. Morse on Banks and Banking, (2d ed.) pp. 16, 117; Angell & Ames on Corporations, sec. 264; Morawetz on Private Corporations, sec. 464; *Parish* v. *Wheeler,* 22 N. Y. 494; *Smith* v. *Bank of the State,*

18 Ind. 327; *Bradley* v. *Bank of the State*, 20 id. 528; *Bank of Middlebury* v. *Bingham*, 33 Vt. 621; *Planters' Bank* v. *Sharp*, 4 Sm. & Mar. 75; *Shoemaker* v. *Nat. Mechanics' Bank*, 2 Abb. (N. Y.) 416; *Elder* v. *First Nat. Bank of Ottawa*, 12 Kan. 238; *Richmond Bank* v. *Robinson*, 42 Maine, 589; *Bond* v. *Central Bank*, 2 Ga. 203; *Bates* v. *Bank of Alabama*, 2 Ala. 460; *Jack* v. *People*, 19 Ill. 57; *O'Hare* v. *Nat. Bank of Titusville*, 77 Pa. 96; *Union Nat. Bank* v. *Gold Mining Co.* 1 Col. 531; *Gold Mining Co.* v. *Nat. Bank*, 96 U. S. 640; *Allen* v. *Freedman's Savings Society*, 17 Fla; *Littlewort* v. *Davis*, 50 Miss. 408; *Hughes* v. *Bank of Somerset*, 5 Lit. (Ky.) 46; *G. R. Bank* v. *Archer*, 8 Sm. & Mar. 151.

For construction of similar provision in National Banking law, see *Stephens* v. *Monongahely Nat. Bank*, 88 Pa. 157; *Union Gold Mining Co.* v. *Rocky Mountain Nat. Bank*, 96 U. S. 640; *Harris* v. *Runnels*, 12 How. 79.

No part of the consideration was illegal, in the sense of the maxim *ex turpi causa non oritur actio*. *First Nat. Bank of Columbus* v. *Garlinghouse*, 22 Ohio St. 502; *Bissell* v. *Michigan Southern and Northern Indiana R. R. Co.* 22 N. Y. 259; *Parish* v. *Wheeler*, id. 494.

The defendant can not be permitted to repudiate a contract the fruits of which he retains. Sedgwick on Statutory and Constitutional Law, 90; *Pratt* v. *Short*, 53 How. 506; *Township of Pine Grove* v. *Talcott*, 19 Wall. 666; *Steam Navigation Co.* v. *Weed*, 17 Barb. 378; *Chester Glass Co.* v. *Dewey*, 16 Mass. 91; *City of Baltimore* v. *Reynolds*, 20 Md. 1.

The restriction imposed by the statute is a simple inhibition. It does not declare that what was done should be void, nor was any penalty prescribed. The contract is valid as to defendant, and he has no right to raise the question of its invalidity. *Whitney* v. *Wyman*, 101 U. S. 397.

There is no privity between the makers and guarantors of a note, or between co-guarantors; and the undertaking is as to a guarantor an original, independent undertaking, and he

will be independently liable. *Ritch* v. *Hathaway*, 18 Ill. 548; *Gage* v. *Mechanics' Bank*, 79 id. 62; 1 Parsons on Notes and Bills, 224.

Mr. R. A. HALBERT, and Mr. C. F. NOETLING, for the appellee:

It is the essence of a contract of guaranty that there should be some one else liable as principal. 1 Chitty on Contracts, (11th ed.) p. 738.

If a loan to a director, in excess of the charter limit, is null and void by reason of its being against the statute or against public policy, it necessarily follows that anything done in aid and furtherance of such illegal or immoral contract is also null and void. So the guaranty falls with the original contract. *Nash* v. *Bonheimer*, 20 Ill. 250; *Neustadt* v. *Hall*, 58 id. 172; *Tobey* v. *Robinson*, 99 id. 222; *Harris* v. *Hatfield*, 71 id. 298; *Arter* v. *Byington*, 44 id. 468; *Tenny* v. *Foote*, 95 id. 99; *Bowman* v. *Cunningham*, 78 id. 48.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

The claim which the Workingmen's Banking Company seek to have established against the estate of Charles Rautenberg, deceased, is based on a note made by A. B. Pope, dated February 8, 1876, and is payable to the order of the Workingmen's Banking Company, nine months after date, for the sum of $2000, with interest after maturity at ten per cent per annum. Payment of the note is guaranteed by A. B. Pope and by the intestate. No proceedings seem to have been had against A. B. Pope, either as maker or guarantor of the note. So far as this record discloses, the only effort to enforce payment of the note is this proceeding against the estate of the deceased guarantor, and which was commenced in the usual way in the county court where his estate is being administered. In all the courts in which the case was

tried the finding was in favor of the estate, and the case comes to this court on the appeal of the banking company from the Appellate Court for the Fourth District, where the judgment of the circuit court was affirmed.

Proof of the execution of the note and guaranty being waived, claimant gave the note, with the guaranty of the intestate and maker written on the back, in evidence, and rested its case. The administratrix, defending for the estate, then gave in evidence a section of the charter of the bank, as follows: "No director of said corporation shall be indebted to said corporation, either directly or indirectly, at any time, to an amount greater than seventy-five per centum of the amount of the capital stock held by such director in good faith as his own." It was proved by the cashier of the bank, that at the time of making the loan, and of the execution of the note and guaranty to secure the same, A. B. Pope, to whom the money was loaned, was a director and stockholder in the bank, and so continued until after the note became due, and was at the time, and so continued to be, indebted to the bank in a sum, exclusive of that mentioned in the note guaranteed by the intestate, in excess of seventy-five per centum of the capital stock held by the maker. The circuit court found for the estate, on the ground the lending of the money to Pope, and taking his note therefor, was prohibited by statute, and hence illegal, and as the guaranty was in aid and furtherance of such illegal contract, no recovery could be had on it against the estate of the guarantor. That finding is warranted both by the law and the evidence.

It is clear the loan made to Pope by the bank was prohibited by the provisions of its charter, and was made in open violation of the limitations on its powers, and whatever may be the decisions elsewhere, no recovery can be had on the note in this State. The case of *Penn* v. *Bornman*, 102 Ill. 523, in this respect is an analogous case, and is conclusive as to this point in this case.

But another consideration is pressed on the attention of the court. It is, conceding the section of the charter cited can be interposed as a defence to the note, it is a privilege personal to the maker, and is a defence that can not be availed of by the guarantor, with whom the law did not forbid the bank to contract. No principle is suggested upon which the position taken can be maintained. The bank, which is the claimant here, was a party to an illegal contract understandingly entered into. It was not lawful to loan the money to the maker of the note, who was a director of the corporation, and who was already owing the bank a sum in excess of the amount it was lawful for him to become indebted to it. The bank will not be permitted to do indirectly that which it is unlawful for it to do directly. The inhibition of its charter in this respect is absolute and positive. Should the bank be allowed to enforce payment of the note against the guarantor, who was not one of its directors nor the owner of any of its stock, it would be to the advantage of the party most guilty, and the only party innocent in the illegal transaction would be made to suffer. The law will sanction no such wrong. The rule is well settled, at least in this State, the court will not assist either party to an illegal transaction in any respect, but will leave them where they have chosen to place themselves. Here, claimant participated in a transaction forbidden by statute, with the expectation to make gain, and it will not be listened to when it asks the aid of a court to assert rights growing out of such transaction as if it were a legal contract. It is a case where the familiar maxim of the law "*ex turpi causa non oritur actio,*" has its appropriate application. *Arter* v. *Byington*, 44 Ill. 468; *Neustadt* v. *Hall*, 58 id. 172; *Harris* v. *Hatfield*, 71 id. 298.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Mr. Justice DICKEY, dissenting.

Mr. JUSTICE DICKEY, dissenting:

I did not concur in the ruling adopted by this court in *Penn* v. *Bornman*, 102 Ill. 523, and I now think it ought to be overruled. Conceding, however, the doctrine taught by that decision, it simply shows that the promise of Pope to repay the $2000 contained in the note made by Pope to the bank, was void, and that the promise made by Pope that the money should be paid in accordance with the terms of that note, contained in his guaranty on the back of the note, was also void. The case goes no further.

The prohibition in the statute is, that "no director of said corporation shall be *indebted* to said corporation * * * to an amount greater than seventy-five per cent of the amount of the capital stock held by such director in good faith as his own." This does not forbid the loaning of money to such a director upon the promise of some other party that it shall be repaid. The statute did not prohibit the bank from lending to Pope, its director, any sum of money upon the credit of Charles Rautenberg. There is no prohibition in the statute against Rautenberg becoming indebted to the bank. Assuming the promissory note made by Pope to be inoperative and void, yet when Charles Rautenberg indorsed upon the back of it his promise that the money mentioned in the note should be repaid, he did the same thing, in substance, as if he had simply executed his own promissory note for that amount to the bank. He rested under no disability. The law did not prevent him from becoming indebted to the bank, hence the loaning of the money upon the credit of Rautenberg was not in violation of the statute. His contract was not an illegal contract. There was no law forbidding Pope to pay the money mentioned in that note, and hence the contract of Rautenberg that Pope would pay it, was not forbidden by the statute.

There are cases, no doubt, wherein the contract of a guarantor is regarded as collateral, and dependent upon the original contract upon which the guaranty is made. In cases where it is inequitable and unjust that the principal in a note should pay the amount, (as, for instance, where the note was procured from him by fraud, and without consideration,) the guarantor of such a note may be relieved by reason of such defence, which might have been set up by the maker of the note. The contract of a guarantor, however, is not *always* collateral and dependent. It is often treated as an original promise. The note of a married woman, at common law, was absolutely void, but the guarantor of such a note was liable upon his guaranty. A forged note is absolutely void, but the guarantor of a forged note is held upon his guaranty, as upon an original promise.

By the decision in the case of *Penn* v. *Bornman*, the bank has no claim against Pope for this loaned money, and by this decision the claim of the bank against Rautenberg is taken away.

We read in the scriptures, that "from him that hath not shall be taken away even that which he hath." Expounders of scripture, I believe, are not entirely in harmony as to the lesson taught in this text; but I feel sure it can not, *taken literally*, be adopted safely by secular courts in administering the law between man and man in relation to their ordinary business transactions.

Mr. JUSTICE CRAIG also dissenting.

Syllabus. Opinion of the Court.

THE PEOPLE OF THE STATE OF ILLINOIS

v.

THOMPSON B. STELLE.

Filed at Mt. Vernon June 21, 1882.

1. PARTIES—*who may sue—on failure by purchaser at execution sale to make payment.* An action of assumpsit will not lie in favor of the plaintiff in execution, against a bidder at sheriff's sale under the execution, for failing to complete his purchase by payment of the purchase money, there being no privity between the parties.

2. The sheriff who makes a sale under execution, alone, can maintain an action against the purchaser for a breach of his contract of purchase. The sheriff, in making such sale, does not act as the agent of the creditor, but as an officer of the law in performing a legal duty.

WRIT OF ERROR to the Circuit Court of Hamilton county; the Hon. C. S. CONGER, Judge, presiding.

Mr. JOHN C. EDWARDS, and Mr. JAMES MCCARTNEY, Attorney General, for the People.

Mr. WM. HAMILL, and Mr. T. M. ECKLEY, for the defendant in error.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

At the January term, 1879, of this court, judgment was rendered against James M. Blades, a defaulting collector of Hamilton county, and the sureties in his official bond, for the sum of $5670.34, in favor of the People of the State of Illinois, in an original suit on said bond, which judgment is still in force and unpaid, except as to the sum of about $270. The sheriff of Hamilton county levied an execution issued on this judgment upon certain tracts of land, and advertised them for sale under the execution. One forty-acre tract was sold and struck off to Thompson B. Stelle, for the sum of $1200. The sale was closed, and the sheriff made out the

certificate of purchase as required by law, and tendered the same to the purchaser, who then failed and refused to pay the amount of his bid. The sheriff returned the execution with his indorsement thereon of the facts in relation to the sale. A writ of *venditioni exponas* thereafter was issued out of the office of the clerk of this court, commanding said sheriff to sell said forty-acre tract of land. The sheriff thereupon re-advertised and re-sold said tract of land, one Wilson becoming the purchaser for the sum of $40. This action in assumpsit was then instituted, in the name of the People of the State of Illinois, against Stelle, the former purchaser, to recover the difference between the amount of his bid, $1200, and the amount for which the land subsequently sold, viz, $40, the difference being $1160. To the declaration alleging the foregoing facts the defendant demurred, and the court below sustained the demurrer, and gave judgment for the defendant. The plaintiff brings the case here by writ of error.

We are of opinion that assumpsit does not lie in favor of the plaintiff in execution against the bidder at a sheriff's sale under the execution, for failing to complete his purchase by payment of the purchase money. There is no privity between the plaintiff in the execution and such bidder. It is the sheriff who makes the sale, and the contract for the sale of the estate is made with the sheriff by the purchaser, and the sheriff alone, as we conceive, can maintain an action for the breach of the contract. The sheriff, in making the contract of sale with the bidder, is not acting as the agent of the execution creditor, but as an officer of the law in the performance of a legal duty, the sheriff being the principal himself. These views find support in the following authorities: *Gaskill* v. *Morris*, 7 Watts & Serg. 32; *Adams* v. *Adams*, 4 Watts, 160; *McKee* v. *Lineberger*, 69 N. C. 217.

We think the demurrer to the declaration was properly sustained, and the judgment of the circuit court is affirmed.

Judgment affirmed.

WILLIAM H. SCRIPPS *et al.*

v.

LUCY K. KING *et al.*

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67a 53
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103 469
179 387
103 469
100a 289

Filed at Mt. Vernon June 21, 1882.

1. CREDITOR'S BILL—*to set aside fraudulent conveyance.* A creditor having no lien must reduce his claim to a judgment before he can maintain a bill in equity to subject property fraudulently conveyed to its payment. If the claim is against an insolvent estate, he must first have it allowed against the estate before he can avoid a fraudulent conveyance,—in other words, he must exhaust his legal remedies.

2. Where there has been a fraudulent conveyance to hinder and delay creditors, and a claim against the grantor has been reduced to a judgment, so as to become an equitable lien on the property, a court of chancery may afford relief under section 49 of the Chancery act.

WRIT OF ERROR to the Appellate Court for the Fourth District;—heard in that court on writ of error to the Circuit Court of Bond county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Mr. DAVID GILLESPIE, for the plaintiffs in error.

Mr. E. L. THOMAS, for the defendants in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

In his lifetime Elisha H. Blanchard, being the owner of the land in dispute, on the 13th day of April, 1861, conveyed it to one William Allen, and he two days after conveyed it to Lucy K., the wife of Blanchard. This arrangement grew out of the fact that Blanchard was dissipated, and the conveyance was made at the solicitation of relatives of the wife. Something more than a year afterwards she executed a deed for the land directly to her husband, and they resided on it until his death, and she has resided on it since. Blanchard died on the 4th of June, 1865, having made a will by which

he appointed William A. Allen and William S. Thomas his executors. They failed to qualify. No person ever applied for or obtained letters of administration on his estate. The widow subsequently married Edward T. King. The notes described in the bill were all due at the time of Blanchard's death, the last maturing more than fifteen months before that date. He retained property in value more than sufficient to pay his indebtedness, and all of the indebtedness described in the bill, but about $150, was contracted after he made the conveyance to Allen. This indebtedness, or any portion of it, was never reduced to judgment. On these facts complainants seek to have the lands sold for the payment of their debts.

In the view we take of this case but one question need be considered, as that disposes of the right to have the relief sought: Can equity entertain jurisdiction on mere demands that have never become a lien on the property sought to be subjected to their payment? Where there has been a fraudulent conveyance to hinder and delay creditors, and a claim has been reduced to judgment so as to become an equitable lien on the property, chancery will afford relief under the 49th section of the Chancery act. That section provides that a creditor having an execution returned no property found, or unsatisfied in part, may file a bill to discover property belonging to the defendant, and on such discovery to apply the same to the satisfaction of the judgment at law.

It was held in *Ishmael* v. *Parker*, 13 Ill. 324, *Greenway* v. *Thomas*, 14 id. 271, *Getzler* v. *Saroni*, 18 id. 511, *Bigelow* v. *Andress*, 31 id. 322, *Newman* v. *Willetts*, 52 id. 98, and a large number of other cases in this court, that as a general rule a creditor must reduce his claim to a judgment before he can maintain a bill to subject property fraudulently conveyed, or to enable a court of equity to enforce the claim of a creditor. If there be exceptions to the rule, they do not embrace this case, as it falls within the rule announced

and adhered to almost from the organization of this court. When the property, if not conveyed, would be subject to sale under a judgment at law, the creditor must obtain a judgment or decree, as though the rights sought to be subjected were purely equitable, before he can maintain a bill, and when the claim is against an insolvent estate, the creditor must have it properly allowed against the estate before he can remove a fraudulent conveyance to reach the property to satisfy his demand. He, in other words, must exhaust his legal remedies. See *McDowell* v. *Cochran*, 11 Ill. 31, *Armstrong* v. *Cooper*, id. 560, *Van Syckle* v. *Richardson*, 13 id. 174, *Bay* v. *Cook*, 31 id. 336, and numerous other cases in our Reports. If any proposition can be settled, this is the settled law in this jurisdiction. In this case the demands are simple debts, not reduced to judgments nor allowed against the estate in the probate court, or in any manner a lien on the property. The creditors had the right under the statute to have obtained administration on the estate, and have their claims allowed, and from the evidence in the record they could have obtained satisfaction of a considerable portion of their debts; but this they failed to do, and having slept on their legal rights, they are in no position to assert them in a court of equity. The cases cited above are conclusive of this question, and they render the other questions discussed by counsel unimportant in this case.

The Appellate Court decided correctly in affirming the judgment of the circuit court, and that decision must be affirmed.

Decree affirmed.

Syllabus.

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53a 327
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ST. LOUIS AND SANDOVAL COAL AND MINING COMPANY

v.

FRANCIS H. EDWARDS *et al.*

Filed at Mt. Vernon June 21, 1882.

1. APPEALS AND WRITS OF ERROR—*by one or more of several parties.* Under the provisions of the Practice act, any one of two or more parties to a suit, either at law or in equity, may sue out a writ of error to have reviewed the propriety of any final decree or judgment.

2. FRANCHISE—*whether involved in suit to wind up affairs of a corporation, and to dissolve the same.* Where a bill is filed against an insolvent corporation by certain of its stockholders and creditors, making the other stockholders parties, praying that the affairs of the corporation be wound up and the corporation itself dissolved, and its effects placed in the hands of a receiver, and a decree is granted to the same extent, a franchise is involved in the litigation, and a writ of error must be sued out, if at all, by the corporation from this court, and the fact that some of the defendants have perfected an appeal to the Appellate Court, will not deprive this court of jurisdiction of a writ of error brought by the corporation.

3. SERVICE OF PROCESS—*on corporation.* On a bill by a director of a private corporation and others, stockholders and creditors of the corporation, the only service on the corporation was by leaving a copy of the summons with the complainant director, the return stating that "the president, clerk, secretary, superintendent, general agent, cashier and principal of said company not found." The bill alleged that the president and all the other directors and officers of the company were non-residents: *Held*, that the service as to the corporation was void, the director with whom the notice was left being a party complainant in the suit, and, the service being void, advantage might be taken of it on error as well as in the trial court.

4. RECEIVER—*whether properly appointed—to take charge of affairs of corporation.* On a bill by a portion of the stockholders, a director and creditor of a private corporation, against the corporation and the other stockholders, alleging mismanagement of the business of the company, its insolvency, its ceasing to prosecute the work for which it was organized, and that it would be useless to resume business, on account of financial embarrassment, and praying for a dissolution of the corporation and the appointment of a receiver, in which the defendant stockholders were properly served by actual or constructive notice of the suit, though the service of summons as to the corporation itself was void, it was *held*, that a clear case was shown for the appointment of a receiver, and the part of the decree making such appointment was affirmed, while that part dissolving the corporation was reversed for want of proper service on the corporation.

WRIT OF ERROR to the Circuit Court of Marion county; the Hon. AMOS WATTS, Judge, presiding.

Mr. M. MILLARD, for the plaintiff in error:

The service as to the corporation was not good. It was on Main, a director of the company, who was an active and interested party in prosecuting the suit. It has been frequently decided that a party can not bring a suit and execute process himself. *Snydacker* v. *Brosse*, 51 Ill. 357; *O'Conner* v. *Wilson*, 57 id. 226; *Hammer* v. *Dole*, 61 id. 307; *Filkins* v. *O'Sullivan*, 79 id. 524; *Lee* v. *Fox*, 89 id. 226.

A receiver should be appointed in no case unless it is made to appear there is an imperative necessity for the step to preserve some particular property for such parties as shall be entitled to the benefit. *First Nat. Bank* v. *Gage*, 79 Ill. 207.

There was no ground for dissolving the corporation. The bill does not allege that the company had forfeited its rights or franchises. There were no judgments or decrees for the payment of money standing against the company, and the receiver's report shows it had ample resources to pay its debts.

Mr. M. SCHAEFFER, and Mr. H. C. GOODNOW, for the defendants in error:

If a corporation suffers acts to be done which destroy the end and objects for which it was instituted, it is equivalent to a surrender of its rights. Angell & Ames on Corporations, (9th ed.) p. 768; 2 Kent's Com. 311, 312; 1 Paige, 258; 4 Sandf. Ch. 559.

Every private corporation is subject to dissolution by a surrender of its corporate franchises, and a forfeiture of them by a willful mis-user or non-user. *Mumma* v. *Potomac Co.* 8 Pet. 287.

As to circumstances under which a corporation may be dissolved, see *State* v. *Pawtuxet Turnpike Co.* 8 R. I. 182; *The People* v. *The Kingston Turnpike Co.* 23 Wend. 193.

To save the subject of litigation, or rescue it from probable destruction, a receiver may be appointed. *Baker* v. *Admr. of Backus*, 32 Ill. 79.

The residence of the St. Louis and Sandoval Coal and Mining Company was in Marion county, Illinois, and it was not a non-resident, and no other person on whom process could be served resided in Marion county, Illinois. Process could not be served by publication on the company. The stockholders of the company were all in court. Those who were not complainants were either actually or constructively served, so that service was had upon all the officers of the company. Hence no facility for imposition.

This company was organized under the general law of the State, and hence section 25 of the act of 1872 is applicable to this company, and that act has given the chancery court jurisdiction in all cases for good cause shown, as well as certain causes pointed out in that section and charged in this bill, among others. *Richardson* v. *Akin*, 87 Ill. 138; *Law* v. *Buchanan*, 94 id. 76; *Wincock et al.* v. *Turpin*, 96 id. 135.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

The bill in this case was brought by stockholders in the St. Louis and Sandoval Coal and Mining Company, against the corporation and other stockholders in the company. One of complainants, Seymore, is a creditor, and another, Main, is a director of the corporation. It is conceded the St. Louis and Sandoval Coal and Mining Company is a corporation existing under the laws of this State, and was organized under the general law of 1872. It is alleged in the bill the directors of the company are all residents of the State of Missouri, except complainant Isaac Main; that the corporation has contracted large indebtedness for sinking a shaft on

grounds purchased for that purpose by the company, and for other purposes; that the corporation has become wholly insolvent; that the directors were fraudulently mismanaging the affairs of the corporation; that the company has ceased to prosecute the work for which it was organized; that it is useless for the company to attempt to resume business, on account of financial embarrassment, and the prayer of the bill is, the affairs of the corporation should be wound up, that a receiver be appointed, and the property of the corporation be sold to pay its indebtedness, and the "corporation dissolved and for naught esteemed in law."

The only service of process on the corporation was made by leaving a copy of the summons with "Isaac Main, a director of said company, the president, clerk, secretary, superintendent, general agent, cashier and principal of said company not found." Other defendants were all either actually or constructively served with process. No one appearing for the corporation, a default was entered, and a decree *pro confesso* rendered against it, as well as against all other defendants not answering. The court found the allegations of the bill substantially true, and entered a decree dissolving the corporation, and appointed a receiver to take charge of its property for the security of its creditors and others interested in it, and continued the cause, that its decree might be executed. The corporation has alone sued out a writ of error in the case from this court, and defendants in error come and move to dismiss the writ of error for reasons assigned, none of which are tenable. It sufficiently appears counsel has authority to prosecute the suit in this court on behalf of the corporation, and by the provisions of the Practice act, any one of two or more parties to a suit, either at law or in equity, may sue out a writ of error. As respects the point made, a portion of defendants were allowed and perfected an appeal in the case to the Appellate Court for the Fourth District, that can make no difference. It is a case where this

court has jurisdiction, in the first instance, to hear the cause, because a franchise is involved in the litigation, and under the Practice act the writ of error must be sued out, if at all, by the corporation from this court. The prayer of the bill is, that the affairs of the corporation be wound up and the corporation itself dissolved, and the decree is to the same extent. It is, therefore, obvious a franchise is involved in the litigation.

Considering the errors assigned, it will only be necessary to notice the first of the series, viz., the service on the corporation was void because Main, the director with whom the summons was left for service upon the corporation, was one of complainants. This court has had occasion more than once to decide a party to the suit can not serve his own writ, and in *Lee* v. *Fox*, 89 Ill. 226, it was held, a petitioner could not serve the notice required by law to be given to the opposite party, and as such service was void, the court failed to obtain jurisdiction in the cause. Between the case cited and the one at bar there is a close affinity. Here the only service on the corporation was made by leaving a copy of the summons with Isaac Main, a director of the company, who was himself a complainant. On the principle of *Lee* v. *Fox*, the service of the defendant by leaving a copy of the summons with a complainant in the suit, although a director in the company, is void, and hence gave the court no jurisdiction of the corporation. It is not a case of mere defective service, as in *Wayman* v. *Crozier*, 35 Ill. 156, which the practice requires shall be pointed out in the trial court or it will be deemed to have been waived. The service being void, advantage may be taken of it on error as well as in the trial court.

The merits of the case, as made by the bill, will not now be considered. That can be better done when the corporation shall have made known its defence. But on the face of the bill it would seem to be a clear case for the appointment of a receiver—a necessary step under the facts stated, if

true, to the preservation of the property of the corporation for the benefit of the creditors and stockholders interested in it. That part of the decree of the circuit court appointing a receiver, as it was done in open court when the court had jurisdiction of a part of defendants, will be permitted to stand, and the residue of the decree will be reversed, and the cause remanded for further proceedings.

Decree reversed in part and in part affirmed.

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WILLIAM J. WARD

v.

MARIETTA E. WARD.

Filed at Mt. Vernon June 21, 1882.

1. DIVORCE—*"extreme and repeated cruelty," as a ground for divorce.* It is difficult to define with precision what is and what is not extreme and repeated cruelty. The same act is not the same thing under all circumstances and to all persons. Necessarily each case must, to a large degree, be judged by itself.

2. As extreme and protracted suffering may be produced primarily by operating on the mind alone, threats of physical violence, and false charges of adultery, by a husband against his wife to her face, maliciously made, are competent evidence to prove cruelty, on a bill for divorce, and when they are accompanied or followed by acts of actual malicious physical violence, they seem to magnify the atrocity of the acts.

3. It seems that any willful misconduct of a husband which endangers the life or health of his wife,—which exposes her to bodily hazard and intolerable hardship, and renders cohabitation unsafe,—is extreme cruelty. To amount to such cruelty it is not necessary there should be many acts, and whenever force and violence, preceded by deliberate insult and abuse, have been once wantonly and without provocation used, the wife can hardly be considered safe.

4. On the trial of a bill for divorce brought by a wife, the proof showed four or five distinct assaults and batteries upon her by the husband, apparently without provocation, and in addition falsely charging her with a want of chastity, and almost constant insult and abuse within a period of three

years, terminating in their separation: *Held*, that the facts authorized a decree of divorce.

5. SAME—*of the allegations and proofs.* Literal proof of every allegation of a bill in chancery, as, on a bill for divorce as to cruelty, is not required. Substantial proof of the material allegations is sufficient.

6. EVIDENCE—*as to contents of a letter written by the witness.* On the trial of a suit for a divorce brought by a wife against her husband, her brother was called by her as a witness, and on the cross-examination the court refused to allow him to testify to the contents of a letter written by him to the defendant, though he was allowed to state the facts he knew and the state of his feelings: *Held*, no error in the ruling.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Massac county; the Hon. DAVID J. BAKER, Judge, presiding.

Messrs. LINEGAR & LANSDEN, for the appellant:

If the cruelty is not extreme, or of such a character as to subject the wife to the danger of great bodily harm, no difference how often repeated, it constitutes no ground for divorce. *Henderson* v. *Henderson*, 88 Ill. 250; *Turbitt* v. *Turbitt*, 21 id. 438.

The acts of the defendant in this case, if sufficiently proven, are too far apart, and not of such a character as to show that the complainant was or is in danger of bodily harm. The marriage contract will not be dissolved for light and trivial causes. *King et al.* v. *King*, 15 Ill. 187.

There must be acts or threats which may raise a reasonable apprehension of bodily hurt; the cause must be grave and weighty, and show a state of personal danger incompatible with the duties of married life. *Harmon* v. *Harmon*, 16 Ill. 90. See, also, *Vignos* v. *Vignos*, 15 Ill. 186; *De La Hay* v. *De La Hay*, 21 id. 252; *Burkby* v. *Burkby*, 25 id. 120; *Von Glahn* v. *Von Glahn*, 46 id. 145.

Mr. J. F. MCCARTNEY, for the appellee:

Two acts of physical violence, coupled with abusive language and false charges of unchastity, amount to extreme

and repeated cruelty. *Farnham* v. *Farnham*, 73 Ill. 499; 1 Bishop on Marriage and Divorce, secs. 762, 724, 729.

While it is true that in a bill for divorce on the ground of cruelty, the specific acts on which the charge rests must be set out in the bill, yet the evidence is not limited to the particular acts charged. Evidence of other acts, which serve to give character to the specific facts proved, is admissible. *Briggs* v. *Briggs*, 20 Mich. 34.

The finding of the jury is *prima facie* proof that it is sustained by the evidence. *Thacher* v. *Thacher*, 17 Ill. 66; *Becker* v. *Becker*, 79 id. 532.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This was a bill for divorce, by appellee against appellant. Several grounds are charged in the bill, but since the verdict of the jury and decree of the circuit court are in favor of appellee upon that of extreme and repeated cruelty only, it is unnecessary to notice the others.

We deem it important to say in regard to the preliminary objection urged, of a variance between the allegations and the proofs, only that, in our opinion, it is without merit. Literal proof of every allegation is not required. Substantial proof of the material allegations is sufficient, and, in our opinion, this record shows such proof was here made.

The principal objection taken to the decree below is, the evidence fails to show that appellant treated appellee with extreme and repeated cruelty. Appellee testified that about the last of February, 1874, on a Sunday, in consequence of her having left word with her hired woman for her oldest son to follow her to church, appellant said to her: "Madam, I'll learn you not to interfere with my children. You are the d———dest b——h in town!" and that he then struck her as hard as he could. Then, a short time after this, a controversy arose between them in regard to a power of attorney to appellant to control property which she had inherited from

a deceased uncle, when, as she testified, appellant struck her again. Sometime after this, as she also testified, appellant said to her: "Madam, you have been countermanding my orders about the children again." She replied: "I have done nothing more than is necessary." He then came up and again struck her. She says he struck her on the side of the face violently,—that the pain it made caused her to cry. At another time, she says, he threw the silverware in the fire, saying at the same time, "D—n these things of your mother's, I will make an end of them!" On a subsequent occasion, she says, while she was sick with the chills, appellant was "calling her names." Her brother, who was present, remarked to him that "nobody but a brute could talk to his wife that way when she was sick," and her husband thereupon ordered him to leave the house. The next difficulty between them she thus describes: "One evening I came back from Rev. J. H. Scott's, the Presbyterian preacher. At supper time he (appellant) said: 'Madam, this is a pretty way for a woman running after other men—neglecting their family. You're one of the d——dest b——s in town.' * * * The next day he kept up the insulting language, calling me an old b——h." She says that she then started to leave, but was induced not to do so by her children. Another difficulty, that occurred in the summer of 1875, she thus describes: "I was wiping the things to hurry up dinner. Mr. Ward came and said, 'I believe I'll go to the hotel and get my dinner.' I said, 'Mr. Ward, you've been away, and had better eat dinner at home.' He said, 'I can be waited on better there than at home; I have to wait a half an hour for sugar.' I told him I tried to do the best I could. I started in the room, and he struck me and knocked me against the door." She says they had trouble again in June or July, 1876, and for three weeks he allowed her no rest, by night or by day. After this, upon one occasion, after reproaching her, he seized her so violently by the wrist that

she was compelled to scream for help. Finally, after detailing many instances of excessive drinking and annoying language by appellant, she says: "Mr. Ward said, 'Madam, by what authority do you forbid the colored man from cutting rails?' I said I had not, but Cap Johnson had. He said, 'Madam, you're a liar! You had better go and stay with Cap Johnson, for you love him better than you do me.' I said I would not stand this. He said, 'Go and live with Cap Johnson.' I went out of the door, and he gave me a push as I went. I was afraid to live in the house with him." She then went and stayed for a time at a Mr. Brewer's, and she says she did so because he accused her of being too intimate with other men, and because she was afraid to live alone with him. Since then they seem never to have lived together as husband and wife.

Appellant, in his testimony, it is true, contradicts most, if not all, of these charges, but in several of the most material appellee is fully corroborated. William McBane, a brother of appellee, testified that, for a considerable time, he boarded with appellant and appellee; that on one occasion, when appellee returned from church, appellant said she only went to church to show herself; that she was too intimate with preacher Scott, anyway,—that she was no better than any other woman in Metropolis. On one occasion he heard appellant call appellee "a d——d b——h." In February or March, 1874, witness came home about dinner time, found appellee sitting on the piano stool crying, and her face very red. This witness, his brother Angus McBane, and the wife of the latter, and a girl named Belle Everett, also corroborate appellee as to what occurred at the time appellant proposed to go to the hotel for his dinner, as testified to by appellee. They show conclusively that he then inflicted a blow upon her. Caroline Knapp, who had been a servant girl in the family, also corroborates appellee as to the occurrence when appellant commenced upbraiding appellee for

having directed that her son follow her to the church. She says he then struck her, and caught her by the cloak and tore it off her, the buttons flying about the room. Appellee's son, Angus Ward, testified substantially to the same thing.

It is, therefore, evident the jury had reason to believe the story of appellee rather than that of appellant. The circuit court felt authorized, by the evidence, to render a decree upon the verdict, and the Appellate Court, with the entire record before them, saw no reason to disturb that decree. No new light has been shed upon the case since it was brought to this court. We can not say we are clearly satisfied the lower courts took a partial and incorrect view of this evidence, and not being so satisfied, it only remains to inquire, did the law, upon such evidence, authorize the decree of divorce?

In *Harmon* v. *Harmon*, 16 Ill. 90, this court, in discussing what is meant by cruelty, said: "There must be acts or threats which raise a reasonable apprehension of bodily hurt, the causes must be grave and weighty, and show a state of personal danger incompatible with the duties of married life." And it was also said these must be extreme and repeated.

In *Farnham* v. *Farnham*, 73 Ill. 497, this court said, in reference to the facts of that case: "Two distinct acts of physical violence to the person of appellee are clearly proven. It is shown by testimony every way worthy of belief, outside that of appellee, that appellant, on two occasions, struck his wife in anger. This would constitute, under our statute, technical cause for divorce. No great physical injury was inflicted upon appellee on either occasion; but the jury could, very properly, consider the abusive language which the evidence shows he applied to her, not only in their private room, but in the presence of strangers, as characterizing these acts of physical cruelty, and as giving to them a poignancy they would not otherwise have. It was proven

he addressed to her, in the coarsest terms, language that implied a want of chastity. There is nothing that inflicts so deep and cruel a wound upon a pure wife as a false accusation of a want of chastity, beside which the physical injuries proven in this case are as nothing. The law has made the one a cause of divorce, but not the other. It would be a reproach to our laws if it were not permissible for a wife to abandon a husband who should continually, without just reason, reproach her with a want of virtue and fidelity to her marriage vows. Happily the law will not require her to submit to any such degradation. While such conduct will constitute no grounds for divorce, under our statute, it will justify her in living separate and apart from her husband."

Undoubtedly extreme and protracted suffering may be produced primarily by operating on the mind alone, and hence threats of physical violence and false charges of adultery, maliciously made, are competent evidence to prove cruelty, (*Kennedy* v. *Kennedy*, 73 N. Y. 369,) and when they are accompanied or followed by acts of actual malicious physical violence, they serve to magnify the atrocity of the acts.

It is difficult to define with precision what is and what is not extreme and repeated cruelty. The same act is not the same thing under all circumstances, and to all persons. Necessarily each case must, to a large degree, be judged by itself. It is said, with perhaps sufficient accuracy, in *Poor* v. *Poor*, 8 N. H. 307: "In the judgment of law, any willful misconduct of the husband which endangers the life or health of the wife, which exposes her to bodily hazard and intolerable hardship, and renders cohabitation unsafe, is extreme cruelty, and in order to amount to such cruelty it is not necessary that there should be many acts. Whenever force and violence, preceded by deliberate insult and abuse, have been once wantonly and without provocation used, the wife can hardly be considered safe."

As has been seen, the proof here shows some four or five distinct assaults and batteries committed by appellant upon appellee, and apparently without provocation, and, in addition to these, almost constant insult and abuse within a period of three years, terminating with their separation. It is but just to appellee to say that even appellant admits there was not the slightest foundation for the charge of adultery. It can admit of no doubt that in his references to the Rev. Mr. Scott and Capt. Johnson he wished her to believe that he supposed her unchaste, for the sole purpose of adding mental pain and suffering to that suffered by her person from the violence of his hands. We think the law authorized the decree as rendered.

An objection is alluded to, but not discussed, in regard to the conduct of a juryman, but since the evidence on this question is not abstracted or fully presented in the briefs, we conclude it is abandoned.

The objection on account of the refusal of the court to allow the witness William McBane to give the contents of a letter written by himself to appellant, is untenable. He was not a party to the suit, and what he wrote was of no consequence. What his feelings were, and what the facts were, he was allowed to show, but what he wrote in regard to appellee's conduct would have presented an immaterial issue.

The court, in giving and refusing instructions, ruled substantially in accordance with the views we have here expressed, and it will subserve no useful purpose to discuss the rulings in these respects *seriatim*.

We see no cause to disturb the decree below, and it will be affirmed.

Decree affirmed.

Mr. JUSTICE MULKEY took no part in the decision of this case.

Syllabus. Brief for the Appellant.

THE CHICAGO CITY RAILWAY COMPANY

v.

CATHARINE MCMAHON.

Filed at Ottawa June 21, 1882.

1. EVIDENCE—*attempt to suppress evidence or influence a witness.* On the trial of an action on the case, brought against a city railway company to recover for a personal injury, the court allowed a witness for the plaintiff to testify that a clerk in the employ of the defendant offered him $300, either to prevent him from appearing as a witness against the company, or to influence his evidence in favor of the company. This was objected to as no part of the *res gestæ: Held*, that the evidence was proper, though not a part of the *res gestæ*.

2. On the trial of a case it may be shown that a party has destroyed or suppressed material evidence, or has fabricated such evidence, as it implies an admission that he has no right to recover if the case is tried on the evidence as it exists.

3. MASTER AND SERVANT—*liability for wrongful act of servant in the scope of his employment.* Where a clerk of a city railway company has assigned to him the general and special duty of looking for and arranging the evidence in cases where the company is sued by persons injured, or claiming to be injured, by the carelessness of those intrusted with the management and operation of its street cars, and is empowered generally to perform that duty without special directions, with general authority to use his own judgment in the performance of his duties, if he, in looking up the evidence in the case, wrongfully and without authority offers money to a witness to keep him from testifying against the company, or to influence his testimony, the company must be held responsible for his act, and it is proper evidence against the company.

4. The master is liable for not only the careless and negligent acts, but also for the willful and malicious acts of his servant while acting within the scope of his duty or employment. This rule is well recognized in this State.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. SIDNEY SMITH, Judge, presiding.

Messrs. DUPEE & JUDAH, for the appellant:

Where an agent or servant in a particular business goes outside of his employment, or beyond his authority, in dis-

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charging his duties, the master will not be liable for his acts. He is liable only for acts done within the scope of his authority. *Oxford* v. *Peters*, 28 Ill. 434; *Pritchard* v. *Keefer*, 53 id. 117; *Green* v. *Town of Woodbury*, 48 Vt. 5; *Johnson* v. *Barber*, 5 Gilm. 430; *Tulter* v. *Voght*, 13 Ill. 285; *McManus* v. *Crickett*, 1 East, 106; *Halty* v. *Markel*, 44 Ill. 228; *Chicago, Burlington and Quincy R. R. Co.* v. *Casey*, 9 Bradw. 638; *Clark* v. *Metropolitan Bank*, 3 Duer, 241; *Stanley* v. *Chamberlain*, 39 N. J. 565; *Gokey* v. *Knapp*, 44 Iowa, 32; Sherman & Redfield on Negligence, sec. 63.

Mr. JOHN LYLE KING, for the appellee:

The testimony of Taylor to the attempt to bribe him was clearly admissible on two grounds: first, that it was an admission by conduct; and second, it was an admission by conduct of an accredited representative of the company in the course of his duty to or in the performance of an authorized service for the company.

Aside from that class of cases where the acts and conduct of persons are admissible against them, under the maxim in *odium spoliatoris*, (2 Wharton on Evidence, sec. 1265,) there is direct authority in point as to the competency of this evidence. *Moriarty* v. *London, Chatham and Dover Ry. Co.* L. R. 5 Q. B. 314; *Annesley* v. *Earl of Aglesea*, 17 How. State Trials, 1139; *Green* v. *Town of Woodbury*, 48 Vt. 5.

A corporation can act only through the instrumentality of its officers, agents and employés, and if the act of such agent or servant be even willful, wrongful or unlawful, if performed or done in the course of his duty, still it is the act of the corporation, or rather of those representing it, for which the corporation is itself accountable. *St. Louis, Alton and Chicago R. R. Co.* v. *Dalby*, 19 Ill. 353; *Illinois Central R. R. Co.* v. *Read*, 37 id. 484; *Toledo, Wabash and Western Ry. Co.* v. *Harmon*, 47 id. 298; *Chicago, Burlington and Quincy R. R. Co.* v. *Dickson*, 63 id. 151; *Northwestern R. R. Co.* v.

Hock, 66 id. 238; *Chicago, Burlington and Quincy R. R. Co.* v. *Sykes*, 96 id. 162.

Mr. JUSTICE WALKER delivered the opinion of the Court:

Appellee entered a street car of appellant through mistake. On finding she had boarded the wrong car, she requested the conductor to stop and permit her to leave it. It is claimed he refused, and in attempting to descend from the car while in motion she was injured. She brought an action of case, alleging negligence, and that she was pushed off by the conductor. Three trials were had. The first resulted in favor of plaintiff, but the verdict was set aside. The second ended by the jury failing to agree, and being discharged. The third resulted in a verdict and judgment for $1500 in favor of plaintiff. A motion for a new trial was duly entered, but was overruled by the court. The case was removed to the Appellate Court for the First District, where the judgment was affirmed, and the defendant appeals to this court, and assigns error on the record.

The jury and Appellate Court having settled the facts, questions of law only are urged for a reversal.

It is alleged for error that the court permitted a witness to testify that a clerk in the employment of the company offered him $300, either to prevent him from appearing as a witness against the company, or to influence the evidence of the witness. It is insisted that this evidence was not a part of the *res gestæ*, and for that reason was not admissible. In answer it may be said, many things are admissible that are no part of the *res gestæ*, such as admissions of the parties, and all efforts by either to destroy, fabricate or suppress evidence. Such is the recognized doctrine of the courts. The rule relating to *res gestæ* did not, therefore, prohibit the introduction of this evidence.

It is believed to be a rule never questioned, that it may be shown that a party has destroyed or suppressed material

evidence, or has fabricated such evidence, because it is in the nature of and implies an admission that he has no right to recover if the case was tried on the evidence in the case as it exists,—that it is not sufficient to recover unless aided by suppressing evidence, or the fabrication of more evidence. It follows that all efforts to suborn witnesses, made by a party, or his authorized agent, are for these reasons proper to be shown.

But a more difficult question is presented in this case, and it is, whether the relation of the person offering the bribe to the witness was such to the company that it was responsible for his acts in the matter. Was the act, although unauthorized and unsanctioned by the company, so far within the scope of his employment as to render his acts the same as those of the company? The agent who approached the witness was a clerk in the office of the superintendent of the company. He testified that it was the business of the clerk, in case of an accident, to take the statements of parties and witnesses to it, and that he attended to the business of looking up witnesses for cases in court; to take the statement of parties to the circumstances of the accident; when an accident occurred to investigate and ascertain all he could with reference to its circumstances; that sometimes he was specially sent for such purpose, and sometimes went in pursuance to general instructions; that no person had any authority from the company to deal with any witness in any way; that had any person used money to suborn or get him out of the way, he would have been instantly discharged.

A corporate body being an intangible and mere imaginary body, must, to accomplish the purposes of its creation, employ or act through natural and physical instrumentalities. It must act through natural persons, and such natural persons perform the acts the corporation by its charter is authorized to perform. The agents of the corporation act for it, and it is by such agencies that it can exercise or

perform any function or act, or incur any liability. Most generally the business is divided into departments or sections, and an agent is put in charge and given power to control his department; but generally a superintendent is appointed to direct and control, appoint or remove subordinate agents, and to intrust to each the power he may exercise, and prescribe the duties he shall perform. This superintendent, under the directors, is usually the active head of the body, and all its agencies perform duties and exercise corporate powers as he may authorize and direct.

In this case the clerk had assigned to him the general and special duty of looking for and arranging the evidence in cases where the company was sued by persons injured, or claiming to have been, by the carelessness of those intrusted with the management and operation of its street cars. He was empowered generally to perform that duty, without special directions. That part of the business of the company was placed in his charge, with the general authority to use his judgment in its performance. His acts, therefore, were the acts of the company within the scope of his employment. His legal authority, of course, but extended to lawful acts. So it is true of all agencies, as they are not appointed for the purpose of committing wrongs, or the performance of illegal acts, except in rare cases. Few actions would be maintainable if a recovery could be had only in cases where express authority is given, or the agent is required, to commit the wrong. It is a general rule, without exception, that when a servant exercises his power or performs his duty in so careless or negligent a manner that wrong ensues to another, the master is liable in damages. This rule has its origin in the foundation of the common law, if it was not borrowed from the civil law.

In this State the rule has a more comprehensive definition and a broader application. It has been repeatedly held, that when acting in the scope of his duty, acts of the servant not

merely careless or negligent, but willful and malicious acts, are embraced. A railroad conductor or engineer is never authorized to commit wanton or malicious acts on persons or property of others, yet our reports abound in cases holding the railroad companies employing them liable for such act done while discharging their several duties. Nor is the rule a new one in this jurisdiction, as it has obtained for a quarter of a century or more. Such acts, under the circumstances, are considered as the acts of the company, as it can act only through agents intrusted with the exercise of their franchises. In this case the clerk was in the exercise of a corporate power, engaged in the performance of a duty delegated to him by the company, and in the performance of that duty he attempted the use of illegal means for the accomplishment of a legal end, and for the benefit of the company. He did not attempt to suborn the witness for the benefit of himself, but for the benefit of the company,—not with the consent of his superior, but in the course of legitimate and authorized business of the company. He was unquestionably employed by the company, was acting for it, and did the act to promote its interest. He was engaged in performance of a duty for the company,—he did the act as a part of the duty, although unauthorized. We are therefore of the opinion that he performed the illegal and unauthorized act while acting in and as a part of his employment, and we must hold the company is responsible for the act. For that reason we hold that the evidence was admissible.

If *Green* v. *The Town of Woodbury*, 48 Vt. 5, announces a different rule, it is opposed to the long and well established doctrines of this court, nor do we incline to change the rule of this jurisdiction merely for the sake of conformity.

We perceive no error in the record, and the judgment of the Appellate Court is affirmed.

Judgment affirmed.

Syllabus.

THE PEOPLE *ex rel.* The Attorney General

v.

THE KANKAKEE RIVER IMPROVEMENT COMPANY.

103 491
133 436
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163 206
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166 552

Filed at Ottawa June 21, 1882.

1. KANKAKEE RIVER IMPROVEMENT COMPANY—*of the duty to file with the Auditor sworn statements of the amount expended in improvements—effect of the act of 1865 in respect to such a requirement in the original charter.* Section 7 of the original charter of the "Kankakee and Iroquois Navigation and Manufacturing Company," passed in 1847, (of which company the "Kankakee River Improvement Company" is the successor,) reserved to the State the right to resume the control of the improvements authorized by the charter, at any time after twenty years, by paying to the company, or to the stockholders thereof, the cost of said improvements, with six per cent interest thereon per annum. The same section required the company to keep a true and accurate account of all expenditures made in respect to such improvements, and to file a copy of the same in the Auditor's office of this State, on or before the first Monday of January in each year, attested by the oath of the president of such company. In 1865 a supplementary act was passed, by the 5th section of which it was provided that the rights of property of the company should in no way thereafter be abridged or impaired, or affected by any prior legislation. This, it is held, operated to repeal that portion of the original charter which reserved to the State the right to resume the control of the improvements. The keeping and filing of accounts of the expenses of the improvements was merely incidental and subservient to the object of purchase by the State, that there might be means at hand of knowing the cost of the work, and which might be of aid and assistance in the exercise of the option to purchase. But the right of purchase having been relinquished by the State, then its incident, the keeping and filing of these accounts, followed it, and was no longer in force after the act of 1865. So the omission after that time to keep and file such accounts was no ground of forfeiture of the franchise of the company.

2. SAME—*of the character of the franchise conferred, as respects its entirety—and of the option to omit to do any part of the work proposed.* The original charter of the Kankakee and Iroquois Navigation and Manufacturing Company gave to that company power to improve the navigation of the Kankakee and Iroquois rivers from points mentioned, up the streams to the Indiana State line, "and also from and to any points on said streams intermediate the extremes hereinbefore mentioned." It was an integral work of the improvement of the navigation of the two rivers which the act contemplated, and it admitted no idea of separability, or of optional privilege on the part of the company in respect to the making or omission to make

the proposed improvement upon any particular parts of the streams within the designated limits.

3. The 6th section of the act of February 16, 1865, amendatory of the original charter, directed the company "to lock and slack-water the Kankakee river from Kankakee City to the east line of the State of Illinois, within eight years from the passage of this act, with works sufficient to pass canal boats of the size of line boats on the Illinois and Michigan Canal." Prior to the act of 1865 there was no time prescribed within which this or any other part of the improvement was required to be completed. It was *held*, this 6th section was not to be construed as merely a limitation in point of *time*, upon the further enjoyment of a supposed option, as applicable to the particular portion of the work therein specified, such option going to the extent, as was contended, of relieving the company of any obligation to make the improvement at all, but was to be understood as a positive requirement, such as was embraced in the original charter, that the work should be done, and in respect to this particular portion that it should be done within the time limited. The requirement became an express condition annexed to the grant of the entire franchise conferred, which the company must have performed to entitle it to a continuance of its franchise. A non-compliance with the requirement would be *per se* a misuser, and a cause of forfeiture of the franchise as for condition broken.

4. Moreover, the franchise was entire in its character, embracing the whole improvement as contemplated in the original charter. It was not divisible so as to admit of a forfeiture as to a part and non-forfeiture as to the residue. An abuse in a particular department of an entire franchise is cause of forfeiture of the whole franchise.

5. SAME—*abuse of franchise—as to the exercise of a discretion whether there shall be a judgment of ouster, or only a fine imposed.* In case of an abuse of a franchise conferred upon a corporation, the statute gives to the court a discretionary power, instead of entering a judgment of ouster from the franchise, unless the court should be of opinion that the public good demands such judgment, to merely assess a fine. Where the omission of duty is of minor importance, the alternative of a fine may properly be considered, but when the non-performance is of a thing which is of the essence of the contract,—going to the object of the incorporation,—not doing the very thing the performance of which was the purpose and object for which the corporation was created, then the State may well resume the control of the subject involved, by a judgment of ouster.

6. So in the case of the Kankakee River Improvement Company, in its omission to comply with the requirement "to lock and slack-water the Kankakee river from Kankakee City to the east line of the State," there was a neglect to do that which was so essential to the accomplishment of the enterprise contemplated by the charter, that the public good required the State should resume the corporate franchise.

Statement of the case.

7. STATE AID *for improvement of rivers—constitutional inhibition as to railroads and canals.* It was objected to the resumption by the State of the franchise granted for the improvement of the navigation of the Kankakee and Iroquois rivers, as for a misuser, that work which had already been done in furtherance of the project would fall into decay and ruin, from inability of the State to make repairs and keep it up, because of the provision of the constitution of 1870 that "the General Assembly shall never loan the credit of the State, or make appropriations from the treasury thereof, in aid of railroads or canals." It was *held*, this provision did not apply. It does not respect rivers,—and a river does not become a canal from having its navigation improved by artificial means.

8. LESSEE OF A FRANCHISE *in part—effect of acts of forfeiture as to other parts.* Where a private corporation holds a franchise which is entire in its character, as, to improve the navigation of a river between certain designated points, but with the power to lease a portion of the works, a lessee of such portion will hold subject to the risk of forfeiture of the entire franchise if his lessor should be guilty of default in respect to the improvement of any other portion of the stream. The lessee in such case would take as in case of any other conditional estate, subject to the condition, and with the liability to forfeiture for breach of the condition.

9. CORPORATION—*amendment of charter—how far binding.* Where an amendment of the charter of a private corporation, limiting the time within which a duty already enjoined is to be performed, is accepted by the company, such additional requirement becomes an express condition to the grant of the franchise conferred, which the company must perform to entitle it to a continuance of its franchise. The non-compliance with the requirement will be regarded as *per se* a misuser, and a cause of forfeiture of the franchise as for condition broken.

10. QUO WARRANTO—PLEADING—*requisites of the information—replication.* An information in the nature of a *quo warranto* against a corporation, for a forfeiture of its franchises, may charge it generally with usurpation, without setting out the causes of forfeiture; and on defendant setting forth the act of incorporation, and justifying under it, the Attorney General may reply the cause of forfeiture generally. Where the plea admits the facts which are relied upon as causes of forfeiture, and justifying, etc., that will dispense with the necessity of a replication showing them, and a demurrer to the plea will present the whole merits of the case.

APPEAL from the Circuit Court of Will county; the Hon. JOSIAH MCROBERTS, Judge, presiding.

By direction of a joint resolution passed by the General Assembly in 1881, the Attorney General of the State filed an information in the nature of a *quo warranto* against the

Kankakee River Improvement Company, alleging that said company, without any warrant, was exercising the power of controlling the navigation of the Kankakee and Iroquois rivers, collecting tolls for the navigation thereof, and of leasing the water powers upon said rivers, and collecting rents therefor, etc., and requiring the company to show cause by what warrant it claimed to exercise such powers. The company filed its plea, alleging the passage of an act by the General Assembly, February 15, 1847, providing for the incorporation of the Kankakee and Iroquois Navigation Company. (Private Laws, 1847, p. 91.)

The first section of the act, describing the purposes and objects of the company, is as follows: "The purposes and objects of said company shall be the improvement of the navigation of the Kankakee and Iroquois rivers, the creation of water power on said streams, and the building and erecting mills and machinery of all kinds on and near said streams, all which improvements and erections are to be made in the way deemed best for the public good by said company. The said company shall have power to improve, as aforesaid, the navigation of said streams, from the point on said Kankakee river which is intersected by the Kankakee feeder for the Illinois and Michigan Canal, up the said river to the Indiana State line, and from the mouth of said Iroquois river up the same to the Indiana State line, and also from and to any points on said streams intermediate the extremes hereinbefore mentioned. The first improvement, however, to be made in the navigation of said streams shall be to perfect the navigation of the Kankakee river from the said feeder to the town of Wilmington, on said last named river."

The corporation, the plea alleges, was organized at some time during the same year, 1847, but nothing was done for some fourteen years afterwards; that at length one Hiram O. Alden acquired control of the stock of the corporation, and in 1861 operations were commenced to create slack-water navi-

gation from Wilmington to the feeder, and that a channel was constructed one hundred feet in width, from the feeder to Wilmington, of the proper depth, and said channel was opened to public navigation in 1861 and 1862. The work done by him, however, proved to be insufficient, and the dam upon which it depended was swept away by a freshet a few years afterwards; that in 1870, (the charter having been amended in 1865, so as to enable the company to offer the needful attractions and securities to obtain credit,) the work was undertaken upon a much more durable and expensive scale by a company of persons from the east, and costly locks and dams of solid masonry and other auxiliary structures of the most complete kind were built, and in the end a sum total of more than half a million of dollars was expended on the improvement. Continuous and navigable slack-water was perfected for a distance of about twenty-one miles, including the feeder,—that is, from Wilmington to the Illinois and Michigan Canal, about nine miles, and to a point above Wilmington, about twelve miles,—four dams and four locks having been built above the State dam, dam No. 4 being at Wilmington; that a large water power was incidentally created at Wilmington, a portion of which has been disposed of, and is of use. But in 1873 the company became embarrassed, was forced to discontinue its operations, and was finally reduced to a condition of irretrievable insolvency. In 1877, by due proceedings for that purpose, certain trust deeds, which had been executed in 1870 and 1871, to secure a loan of $600,000, conveying the franchise, as well as the improvement, and certain real estate of the company, were foreclosed, and the mortgaged property sold. In 1879 the improvement and franchise were bid in by one E. P. Carpenter, for himself and associates, and they, soon after, took the necessary steps under the general law to form a new corporation, styled the "Kankakee River Improvement Company," the defendant to this information.

The plea sets out at length the charter, and the several amendatory and supplementary acts thereto, and a full history of the enterprise. The plea disclaims as to so much of the franchise as relates to the Kankakee river from the head of the level produced by the upper dam eastwardly to the State line, and confesses the information in reference thereto. The circuit court overruled a demurrer to the plea, and gave judgment in favor of the defendant, dismissing the information.

Mr. JAMES MCCARTNEY, Attorney General, for the People, made the following among many other points:

Legislative grants of a franchise giving exclusive privileges are to be construed most strongly in favor of the State. Nothing is to be taken as conceded but what is given in unmistakable terms, or by implication equally clear. *Mills et al.* v. *County of St. Clair et al.* 2 Gilm. 197; *Northwestern Fertilizing Co.* v. *Hyde Park*, 70 Ill. 634; *Fertilizing Co.* v. *Hyde Park*, 7 Otto, 659; *R. and G. R. R. Co.* v. *Reid*, 64 N. C. 155; *State* v. *Krebs et al.* id. 604; *McAden* v. *Jenkins*, id. 796; *Sprague* v. *Birdsall*, 2 Cow. 419; *Rathbun* v. *Acker*, 18 Barb. 393; *Doe ex dem.* v. *G. R. R. and B. Co.* 15 Kelly, 524; *Mayor* v. *M. and W. R. R. Co.* 7 Ga. 221; *Home of the Friendless* v. *Rouse*, 8 Wall. 430; *Camden and Amboy R. R. Co.* v. *Briggs*, 22 N. J. 623; *Commonwealth* v. *Erie and Northeastern R. R. Co.* 27 Pa. St. 339.

A grant of corporate privileges to a body of men, when accepted, is a contract between the State and the corporators, and the grant may be resumed by the State for non-performance of the contract or misuser of the franchise. *Erie and Northeastern R. R. Co.* v. *Casey*, 26 Pa. St. 287; *Attorney General* v. *Petersburg and Roanoke R. R. Co.* 6 Ired. 456.

The law of 1865, by no known rules of construction, can be held to repeal any part of the act of 1869. Our own decisions have always been adverse to repeals by implication.

Fowler v. *Perkins*, 77 Ill. 271; *Bruce* v. *Schuyler et al.* 4 Gilm. 221; *Hume et al.* v. *Gossett*, 43 Ill. 297; *People ex rel.* v. *Brayton*, 94 id. 341.

From these authorities it follows that the act of 1865 did not repeal that part of the act of 1847 which required the company to make annual statements of the cost of the improvement to the Auditor of Public Accounts, and the plea impliedly admits that this duty has not been performed.

A corporation must come up to the substantial objects for which it was created and endowed, and if it fails to do so, it is a breach of trust. Even an inability through misfortune to answer the design of its creation, is also cause of forfeiture. *People* v. *Bristol and Renssellaerville Turnpike Co.* 23 Wend. 222; *Kentucky River Navigation Co.* v. *Commonwealth*, 13 Bush, 435; *London City* v. *Vanacre*, 1 Ld. Raym. 496.

That the franchise of a corporation may be declared forfeited for a misuser or a non-user, see *Terrett et al.* v. *Taylor et al.* 9 Cranch, 43; Angell & Ames on Corporations, sec. 776; Field on Corporations, sec. 455; Potter's Law of Corporations, sec. 670; *Chesapeake and Ohio Canal Co.* v. *Baltimore and Ohio R. R. Co.* 4 Gill & J. 1; *People ex rel.* v. *Kingstown and Middleton Turnpike Co.* 22 Wend. 193; *Thompson* v. *People*, 23 id. 537; *People* v. *Fishkill and Beekman Plank Road Co.* 27 Barb. 445; *People* v. *Phœnix Bank*, 24 Wend. 431; *Lumbard* v. *Stearns*, 4 Cush. 60; *State* v. *Real Estate Bank*, 5 Ark. 595.

Mr. G. D. A. PARKS, for the appellee, made the following among other points:

It is a universal maxim that forfeitures are not favorite objects of the law, and private corporations, even in proceedings of this kind, are not excluded from the benefit of that maxim. High on Extraordinary Remedies, sec. 649; *Voris* v. *Renshaw*, 49 Ill. 426; *Hartford Fire Ins. Co.* v. *Walsh*, 54 id. 168; *Thompson* v. *People*, 23 Wend. 585.

Legislative grants, including charters of incorporation, while never construed unfavorably to the State in really doubtful cases, are nevertheless to be interpreted like all instruments, reasonably and fairly, so as to carry out the manifest intent of the parties. To ascertain this, the history of the act and the circumstances attending its origin may be consulted. *Edwards* v. *Pope*, 3 Scam. 465; *Mills* v. *St. Clair*, 2 Gilm. 227; *Newhall* v. *Galena and Chicago R. R. Co.* 14 Ill. 275; *Belleville R. R. Co.* v. *Gregory*, 15 id. 22; *Richmond R. R. Co.* v. *Louisa R. R. Co.* 13 How. 71; Potter's Dwarris on Statutes, 175; *Charles River Bridge* v. *Warren*, 11 Pet. 589.

The requirement in the 7th section of the original charter directing the corporation to file annual accounts, having been repealed, or if not repealed having become inoperative and obsolete by force of the constitution of 1870, can now furnish no ground of forfeiture.

The sole object of the provision in question was as ancillary to the immediately preceding provision in the same section, reserving to the State the right to purchase the improvement after twenty years from the date of organization, and take it under governmental control. But regardless of the effect to be given to the act of 1865, the constitution of 1870 deprived the legislature of the power to purchase the improvement. Const. 1870, art. "Canal."

The franchise conferred was not a unit, or entirely for the whole extent of both rivers to the State line. While the company was granted the privilege of making the improvement from extreme to extreme, it also was allowed the option to abridge the extent of its undertaking "from and to any points on said streams intermediate the extremes." Even were a technical case of forfeiture made out, the court is no longer required to render a judgment of ouster unless "the public good" appears to demand it. Rev. Stat. chap. 112, sec. 6.

The information filed in this case is defective in substance, and even if the plea itself should be found obnoxious to the demurrer, that demurrer must be carried back and sustained to the information. *People ex rel. Koerner* v. *Ridgely*, 21 Ill. 67; *People* v. *Mississippi R. R. Co.* 13 id. 67; *Lavalle* v. *People*, 68 id. 255.

It contains no allegation of time, as to the offences charged, or any of them. 1 Chitty's Pleadings, 257; Arch. Criminal Pleadings, 34; *Donnelly* v. *People*, 11 Ill. 553.

It fails to set out or intelligibly refer to the acts, or parts of acts, on which the claim of non-user and forfeiture is based. High on Extraordinary Remedies, secs. 724, 727.

It contains no certain and proper allegations of the unlawful acts or practices of the defendant complained of, but only general and indefinite charges. *The King* v. *Roberts*, 3 Salk. 198; *Lavalle* v. *People*, *supra*.

Mr. JAMES MCCARTNEY, in reply:

In an information in the nature of a *quo warranto* the People are not required to show anything. It calls upon the defendant to show by what right he exercises the franchise. The Attorney General is not bound to prove any fact save such as may be tendered by replication, upon which issue is taken. *Clark* v. *People ex rel. Crane*, 15 Ill. 213; *People* v. *Ridgely et al.* 21 id. 63; *People* v. *Bank of Niagara*, 6 Cow. 196.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The question is as to the sufficiency of the plea. The demurrer interposed by the Attorney General raises two principal objections in respect to the plea.

1. The first one is, that the company did not file a sworn statement with the Auditor of Public Accounts of the amount expended in improvements on or before the first Monday in January in each year, as required by its charter.

Section 7 of the charter reads as follows: "The State of Illinois hereby reserves the right to resume the control of the improvements hereby authorized, together with all the privileges thereunto belonging, at any time after twenty years from the time of the organization of the said company under this act, by paying to said company, or the stockholders thereof, the cost of said improvements and works, with six per cent interest thereon per annum; and the said company is hereby required to keep a true and accurate account of all expenditures made in erecting and completing said works and improvements, and to file a true and correct copy of the same in the Auditor's office of this State, on or before the first Monday of January in each year, attested by the oath of the president of such company."

The plea admits non-compliance with this requirement, and avers that it ceased to be operative by virtue of the supplementary act of 1865. (Pr. Laws 1865, vol. 2, p. 97, secs. 5, 8.)

Section 5 of the act last referred to is as follows: "That the said Kankakee Company, their associates, successors and assigns, shall hereafter have perpetual succession, and their rights of property shall in no way hereafter be abridged or impaired, or affected by any prior legislation. And they shall have the same right to lease the whole or any part of their properties that they now have by the amendments of 1859 to lease a portion thereof, and upon such conditions and for such term or terms of time as the directors of said company shall, from time to time, see fit to make."

We agree with defendant's counsel in the view that the keeping and filing of accounts of the expenses of the improvement was incidental, and subservient to the object of purchase by the State, that there might be means at hand of knowing the cost of the work, and which might be of aid and assistance in the exercise of the option to purchase; and if the right of purchase by the State has been relinquished, then that its incident, the keeping and filing of these accounts,

followed it, and is no longer in force, having become a thing of no use. And we are inclined to the further view, that by the act of 1865 the State did yield up its right of purchase of this improvement. The scope of the act of 1865 was in the aid and relief of the company, and for the increase of its rights and ability. Under the original charter the company could effect no loans. In 1865 barely two years remained before the State could resume the franchise and take the property, by paying its cost, with six per cent interest. By the charter the existence of the corporation was limited to fifty years,—by the act of 1865 it was endowed with perpetual succession. It was empowered to increase its capital stock at will. It was authorized to mortgage its franchise and property, without limit as to time or amount, investing the directors with power to confer upon bondholders the right to convert the principal of the bonds into stock at any time within ten years. It was further authorized to lease the whole or any part of its corporate rights and properties for any time, or on any terms the directors saw fit. All this does not well consist with a power to take the property at the end of two years, on paying its cost, with interest, and in agreement with the tenor of the act the 5th section provides expressly that the company's rights of property shall in no way hereafter be abridged or impaired, or affected by any prior legislation. This seems to us to be a repeal of said section 7 of the original charter for the State's resumption of control. We perceive no other provision of prior legislation but this that had an operation to abridge, or impair, or affect the company's rights of property. And the 8th section further provides, "that all acts or parts of acts, all sections or parts of sections, inconsistent with the provisions of this act are hereby repealed."

We are of opinion, then, that the not keeping and filing of these accounts, as directed by section 7 of the charter, is no cause of forfeiture.

2. The second ground of objection to the plea is, that it admits a non-compliance with the following requirement of section 6 of the supplementary act of February 16, 1865: "Said company shall lock and slack-water said Kankakee river from Kankakee City to the east line of the State of Illinois, within eight years from the passage of this act, with works sufficient to pass canal boats of the size of line boats on the Illinois and Michigan canal."

The plea professes to justify only in respect to so much of the line of improvement described in the charter as has been actually undertaken and accomplished. This is shown to be the part extending from the head of the Kankakee feeder for the Illinois and Michigan Canal to the upper limit of the pool or level created by the upper dam, known as dam No. 4, situated at Wilmington. Including the extent of this level, and of the feeder, the improvement made furnishes continuous navigation for a distance of about twenty-one miles. The plea states, in relation to the feeder, that by section 4 of the act of February 16, 1865, the trustees of the Illinois and Michigan Canal were authorized to deepen the feeder to the same depth of navigation as already exists in the main canal, and to establish and collect the same rate of tolls; that under this authority the trustees entered into joint arrangements with the managers of the company to perfect the feeder into a navigable channel; that the banks were raised, the State dam strengthened, a new guard lock built, etc. This was done under the direction of the State officers, but at the sole expense of the company. The plea then, after setting up the justification it does in respect to the portion completed, admits that the improvement from Kankakee City to the east line of the State of Illinois has not been commenced, and is no longer in contemplation by the defendant, and it professes to offer nothing which can be deemed a legal excuse for this omission.

In behalf of the defendant it is insisted that the charter, while granting to the Kankakee and Iroquois Navigation and Manufacturing Company the *privilege* of improving both of these rivers as far east as the State line, also bestowed upon them in express terms the option of stopping at any "intermediate point;" that this option has never been withdrawn or restricted by any subsequent law, but has in repeated amendatory and supplemental acts been recognized and confirmed, and that the 6th section of the act of February 16, 1865, which directs the company "to lock and slack-water the Kankakee river from Kankakee City to the east line of the State of Illinois, within eight years from the passage of this act, with works sufficient to pass canal boats of the size of line boats on the Illinois and Michigan Canal," is to be construed only as a positive limitation, in point of *time*, upon the further enjoyment of this option, so far as applicable to the particular portion of the work in this section specified, and was not intended to affect in any manner the rights of the company otherwise and elsewhere.

We do not so read the first section of the act of incorporation as giving in express terms to the company the right to construct the work from Wilmington to the feeder, and relinquish its privilege to construct any more of it if found beyond its means or inexpedient. The words relied on as doing so, are: "and also from and to any points on said streams intermediate the extremes hereinbefore mentioned." The power is given the company to improve the navigation of the two streams from points mentioned up the streams to the Indiana State line, "and also from and to any points on said streams intermediate the extremes hereinbefore mentioned." We attach to these words no other force than as excluding the idea that the whole work must be proceeded with and completed together, but allowing its prosecution and completion by sections. The purpose and object of the company is declared to be the improvement of the navigation of the two

rivers, the first improvement, however, to be made in the navigation of the streams, should be to perfect the navigation of the Kankakee river from the feeder to the town of Wilmington. It is an integral work of the improvement of the navigation of the two rivers which the act contemplates, and it admits no idea of separability or of optional privilege, more than may be found in the mode above prescribed of the doing of the work.

It is said that if we read *or* in place of *and*, in the words referred to, "*or* also from and to any points," etc., instead of "*and* also from and to any points," etc., there would be no room for dispute as to the correctness of the view taken by defendant,—that this is but a trifling grammatical variation, and that it is not an uncommon freedom for courts, in construing instruments, to substitute one of these conjunctions for the other, as the sense seems to suggest. But we fail to see that the sense of the context indicates that there should be made here the substitution which is suggested.

The original charter required work to be commenced on the Kankakee river within three years from the passage of the act of February 15, 1847. The company had suffered this period to expire without doing any work. Now, as respects defendant's construction of the clause in question having been repeatedly recognized by subsequent amendments, as claimed, the first of these amendments was passed February 15, 1851, (Private Laws, 1851, p. 212,) and it is this language of that act which is referred to and relied on: "Be it enacted," etc., "that the time allowed to the Kankakee and Iroquois Navigation and Manufacturing Company to complete their improvements of the Kankakee river as far as the town of Wilmington, be and the same is hereby extended to a period of eleven years from and after the passage of the act to which this is supplementary." This is the first of any limitation of time for the completion of the work, or any part of it. The original act prescribed none whatever, but this

amendment fixes the time for the completion of that part of the work which was to be first done (that to Wilmington) at eleven years. It is said at this time the entire franchise had been utterly forfeited as to the whole line, and here is only an extension to complete the improvement *as far as the town of Wilmington*, to eleven years. But the forfeiture had never been enforced by the State, and the cause of forfeiture being the not commencing the work within three years, this act was a waiver of the forfeiture as to the entire franchise. The improvement as far as the town of Wilmington is spoken of because that was the first which was to be made by the original act. We see nothing in the language here employed carrying the idea of division of the franchise. At the same session another act was passed to enable the inhabitants of the towns of Wilmington and Reed, an adjacent town on the river, to tax themselves in aid of the improvement from Wilmington to the feeder, the money to be applied, first, to that improvement; second, to the building of a bridge across the Kankakee river at the town of Wilmington. (Private Laws, 1851, p. 232.) Any money these towns might thus raise, it would be very proper should be applied upon the particular part of the work which especially benefited them. In 1857 another law giving the same right to the inhabitants of Kankakee county was passed, but nothing effectual was done under either law, and in 1859 they were repealed.

In 1859 the corporate name was changed to the "Kankakee Company," and the company was empowered to lease any and all its rights to improve the Kankakee river, for the purpose of navigation and manufacturing, from the head of the island at Wilmington to the Kankakee feeder, and authorizing the lessees to levy and collect tolls. Stress is laid upon the dropping of the name of Iroquois entirely, and styling the company the "Kankakee Company," as being inconsistent with the idea of an entire scheme for the improvement

of the Kankakee and Iroquois rivers, and an entire franchise for the improvement of both these rivers, as first set forth in section 1 of the original act. And so the same with respect to the power of leasing, the legislature having authorized the leasing of the portion named, it is said it could not have intended that the lessees who might undertake this part of the work should be placed at the risk of forfeiture if their lessors should be guilty of any default in respect to the improvement of any other portion of the streams. The legislature, of course, would not anticipate any forfeiture. They would suppose the company would do its duty, and comply with whatever conditions they were required to perform. Lessees of the franchise in part would, of course, take as in case of any other conditional estate, subject to the condition, and with the liability to forfeiture for breach of the condition, as in any case of a conditional estate.

It is dwelt upon that this was entirely a Wilmington project, for the benefit of Wilmington solely, and that there was no real purpose and design to extend the improvement any further than Wilmington, and that the power to make any improvement higher up was merely put in as it would be a desirable privilege to have in case in the distant future the company might desire its exercise. This might have been the purpose of the originators of the enterprise, but the State was one of the parties to the contract, and its purpose and object is to be found in the acts of the legislature, and they declare it to be, in the original act, the improvement of the navigation of the Kankakee and Iroquois rivers, the first improvement, however, in such navigation to be from the feeder to the town of Wilmington. The Iroquois river seems to have become somewhat subordinated in the scheme in its not being mentioned so prominently as the Kankakee in the subsequent acts of the legislature, and having been taken out of the name of the company. We regard it as one franchise for the improvement of the navigation of both rivers, the

most prominent feature of the work being the improvement from the feeder to Wilmington, that being required to be first made. All of the optional privilege which is claimed, that we see in the case, is in there being no time named for the beginning or completion of any other part of the work than that completed, and so far as there is any express obligation this might practically amount to an option to make any other part of the improvement or not.

The above appears to be the state of the legislation down to the act of 1865, which is the last act. Section 6 of that act, as above recited, is: "Said company shall lock and slack-water said Kankakee river from Kankakee City to the east line of the State of Illinois, within eight years," etc. This act greatly enlarged the franchise of the company, giving to the company largely increased powers and privileges, but it was optional to accept this amendatory act or not. It might have declined acceptance of the act, and then the duty enjoined by this 6th section would not have rested upon it. But it did accept the amendment, and by the acceptance it undertook to do what this section enjoined. The requirement became an express condition annexed to the grant of the franchise conferred, which the company must have performed to entitle it to a continuance of its franchise. The non-compliance with the requirement was *per se* a misuser, and a cause of forfeiture of the franchise as for condition broken. The law to this effect is clear and well settled. *London City* v. *Vanacre*, 1 Lord Raymond, 496; *The People ex rel.* v. *Kingston and Middletown Turnpike Co.* 23 Wend. 193; *Thompson* v. *People*, id. 537; *Chesapeake and Ohio Canal Co.* v. *Baltimore and Ohio R. R. Co.* 4 Gill & J. 1; *The People, etc.* v. *Fishkill and Beekman Plank Road Co.* 27 Barb. 445; *The People* v. *The Phœnix Bank*, 24 Wend. 431; *Attorney General* v. *P. and R. R. R. Co.* 6 Ired. 456; Angell & Ames on Corporations, secs. 774, 776; High on Extraordinary Remedies, sec. 651.

The plea admits that the improvement from Kankakee City to the east line of the State of Illinois has not been commenced, and is no longer in contemplation by the defendant. The law is not questioned by defendant's counsel that the non-compliance with this requirement of section 4 is cause of forfeiture, but it is claimed to be a condition which respects only that portion of the improvement between Kankakee City and the State line, and that the breach is ground of forfeiture of only so much of the franchise as relates to that portion of the improvement, and that that part of the franchise may be forfeited, and the company still hold and enjoy the part of the improvement which they have completed, without the franchise, as respects that part, being affected by the breach of the condition. It is said that as before there was no obligation, but merely an optional privilege, to make this improvement above Kankakee City, it could not have been the intention of the legislature, although the terms of the requirement are express and peremptory, to impose any obligation on the company, as this whole act of 1865 is for the benefit of the company, in its aid and relief. And so from this deduced intention of the legislature it is insisted that the true construction of this requirement is, not that it imposes any obligation on the company, but that it only limits the time for the exercise of its optional privilege of improving the navigation of the river above Kankakee City, and failing to make such improvement within the eight years limited, the privilege to improve that portion of the river is terminated, and that that is all the effect. It is true that the provisions of the act of 1865 are mainly beneficial to the company, yet as such valuable additional rights and privileges are by the act granted to the company, it might very well consist with the beneficial scope of the act that something should be exacted from the company in return—even this requirement of the 4th section.

The act of 1865 uses this language: "That the said Kankakee Company, the better to enable them to carry into effect the purposes of the act to which this act is supplementary, may, at their option, increase their capital stock to such an amount as may be required to cover the cost of constructing all the works authorized by their charter, and by the acts amendatory thereof and supplementary thereto." At that time the improvement below Wilmington had actually been made, and was, and had been for about three years, in actual use. We see nothing in this language employed favoring any idea of divisibility of the franchise, or that the improvement below Wilmington was a separate and independent work, but showing rather the same purpose of unity and entirety which we find as manifested in the original act. The requirement is in terms the most express, that the company *shall* make the improvement between Kankakee City and the east line of the State within eight years. We think it inadmissible to construe away such language as not meaning what it plainly expresses, from the supposed intention of the legislature not to impose anything onerous upon the company.

We can see here but one entire franchise for the improvement of these streams, and that this obligation to make the improvement above Kankakee City was a condition annexed to this entire franchise. And we can not admit the idea, so ably and ingeniously pressed upon us, of the divisibility of the franchise, that there became a separate, independent franchise as to the completed portion of the improvement below Wilmington, and a like one as to the portion of the improvement above Kankakee City, to which latter only the condition was annexed, and that it was the franchise as to this last named portion of the improvement only which was forfeitable for breach of the condition. We think the non-compliance with the requirement in question was cause of forfeiture of the entire franchise. An abuse in a particular department

of an entire franchise is cause of forfeiture of the whole franchise. Angell & Ames on Corp. sec. 776.

The hardship upon the company of enforcing a forfeiture is urged as a reason against applying this remedy. This is the common argument addressed to courts in these cases, and the answer they make is, that the appeal is made to the wrong forum,—that this is a question for the legislature that prescribed the requirements of the charter. The courts have no dispensing power; that the only questions for a court in such cases are, is the act required, and has it been performed. Yielding to such considerations of hardships would be a doing away with the established legal remedy of forfeiture for the breach of conditions annexed to estates. Inconvenience is the necessary result of the application of such a remedy. It is held to be most important to the public interest that the grantees of public franchises should be held to a faithful performance of the obligations which they assume, and to secure this, courts must administer the prescribed remedy in case of failure.

Lastly, the court is invoked to exercise its discretionary power under the statute, and only assess a fine, the statute providing that instead of judgment of ouster from a franchise for an abuse thereof, unless the court is of the opinion that the public good demands such judgment, a fine may be assessed instead. Had there been but the omission of some duty of minor importance, the alternative of a fine might properly be considered; but the non-performance here is of a thing which is of the essence of the contract,—it goes to the object of the incorporation, not doing the very thing the performance of which was the purpose and object for which the company was instituted. It is failure by the corporation to act up to the end of its creation. The demand of public good is nothing less than that there should be a resumption by the State of the corporate franchise of which there has been such misuser,—that the company should be made to give

way, so as to afford opportunity, through some other instrumentality, for the accomplishment of this work of public advantage, the improvement of the navigation of these two rivers, or at least of the Kankakee, to the Indiana State line.

It is suggested that if the State should take into its hands the portion of the work which has been completed it would fall into decay and ruin, from inability of the State to make repairs and keep it up, because of the provision of the constitution of 1870, that "the General Assembly shall never loan the credit of the State, or make appropriations from the treasury thereof, in aid of railroads or canals." We do not understand that this provision would apply. It does not respect rivers,—and we do not consider that a river becomes a canal from having its navigation improved by artificial means.

It is urged, finally, that the information is defective in not setting out the causes of forfeiture, and that the demurrer should be carried back and sustained to the information. The information in this respect appears to conform to the precedents. An information in the nature of a *quo warranto* against a corporation, for a forfeiture of its franchises, may charge it generally with usurpation, and on defendant's setting forth the act of incorporation, and justifying under it, the Attorney General may reply the cause of forfeiture generally. *The People* v. *Bank of Niagara*, 6 Cow. 196. The plea here admits the facts which are relied upon as causes of forfeiture, thus dispensing with the necessity of a replication showing them, and presenting upon demurrer to the pleas the whole merits of the case.

Being of opinion the demurrer to the plea should have been sustained, the judgment of the circuit court is reversed and the cause remanded.

Judgment reversed.

Syllabus.

103 512
123 46
22a 119
22a 121
22a 190
22a 464
22a 511
26a 399
33a 592
103 512
126 385
28a 151
103 512
31a 198
103 512
32a 313
103 512
135 286
103 512
143 175
44a 418
103 512
148 185
103 512
159 15
152 592
44a 59
44a 127
103 512
49a 214
50a 395
52a 49
52a 568
103 512
157 412
46a 385
47a 198
103 512
53a 429
55a 597
56a 478
58a 428
103 512
59a 58
103 512
66a 656
103 512
69a 182
103 512
73a 436
75a 217
103 512
77a 58
103 512
80a 308
103 512
188 [3]345
103 512
99a [1]529
103 512
102a [3]646
102a [3]646
103 512
105a 89
103 512
209 [3]315
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103 512
215 [3]397
215 [3]533
115a [1]113

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY

v.

THOMAS L. JOHNSON, Admr.

Filed at Ottawa June 21, 1882.

1. NEGLIGENCE—*notice to defendant of impending danger.* In an action to recover damages for a personal injury resulting from the alleged negligence of the defendant, the plaintiff having himself contributed to such result by negligence on his part, by placing himself in a situation of danger, if the question arises as to the measure of care it was the duty of the defendant to have observed in case it was in his power to have avoided the consequences of the plaintiff's negligence, then in order to charge the defendant it must be shown he had knowledge of the peril in which the plaintiff had placed himself, or the equivalent of such knowledge, at least long enough before the injury inflicted, to have enabled him to form an intelligent opinion as to how the injury might be avoided, and to apply the means.

2. SAME—*contributory and comparative negligence.* To authorize the plaintiff to recover on the ground of the mere negligence, as distinguished from the willful tort, of the defendant, it must appear that the party injured exercised ordinary care, such as a reasonably prudent person will always adopt for the security of his person or property, to avoid the injury complained of. In the absence of ordinary care on the part of the plaintiff, in such case, there is no right of action, and can be no recovery.

3. In applying the rule that the plaintiff may recover in an action for negligence, notwithstanding he has been guilty of contributive negligence, where his negligence is but slight and that of the defendant gross in comparison with each other, it must be understood the terms "slight negligence" and "gross negligence" are used in their legal sense, as defined by common law judges and text writers, and as expressing the extremes of negligence, of which there are no degrees. In giving the definitions of the degrees of negligence, the word "diligence," as used in that connection, is synonymous with "care." So it is said, gross negligence is the want of slight diligence. Slight negligence is the want of great diligence, and intermediate there is ordinary negligence, which is defined to be "the want of ordinary diligence."

4. In applying the measure of slight and gross negligence, however, to the acts of the respective parties charged to have been negligent, it is, of course, to be considered that the term "negligence" is, itself, relative, and its application must depend on the situation of the parties, and the degree of care and vigilance which the circumstances reasonably impose. So that in each case, where there has been contributory negligence on the part of the plaintiff, and he seeks still to recover under the rule in respect to comparative negli-

Statement of the case.

gence, the question will relate to the measure of care, under the circumstances shown by the evidence to have existed, imposed upon the parties respectively.

5. In this case, where the plaintiff sought to recover for the death of his intestate, caused by the alleged negligence of the defendant railroad company in the running and management of a locomotive and train of cars on its road, the evidence tending to show contributory negligence on the part of the person killed, the trial court, in undertaking to lay down the rule of comparative negligence, instructed the jury, at the instance of the plaintiff, that although it should appear that the plaintiff's intestate was not exercising ordinary care, yet the plaintiff might recover if the negligence of his intestate was slight and that of defendant was gross in comparison with each other. It was *held*, the rule was not correctly stated, as it can not legally be true that where the person injured fails to exercise ordinary care, and the defendant is guilty of negligence only, the negligence of the person injured is slight and that of the defendant gross in comparison with each other.

6. EVIDENCE—*opinions of witnesses—as to speed of railway train.* In an action for personal injury from being run over by a railway train, where the question of the speed of the train is involved, opinions of witnesses may be received as to that fact.

7. SAME—*as to pecuniary circumstances of parties.* In a suit to recover damages for the death of a person caused by the alleged negligence of the defendant, it is technically erroneous to admit evidence that the family of the deceased were entirely dependent on his labor for support, though in the particular case the admission of such evidence was not considered as doing any harm.

8. INSTRUCTION—*attempting to connect discordant propositions.* The blending of separate and distinct legal propositions in the same sentence or paragraph in an instruction, usually causes error, in that it tends to confuse and mislead, and should be avoided.

APPEAL from the Appellate Court for the Second District; —heard in that court on appeal from the Circuit Court of Kendall county; the Hon. CHARLES KELLUM, Judge, presiding.

This suit was instituted in the circuit court by Thomas L. Johnson, as administrator of Christian L. Johnson, deceased, against the railroad company, to recover damages for the death of the plaintiff's intestate, occasioned, as is alleged, by the negligence of the company in the management and running of a locomotive and train of cars. Upon a trial the

plaintiff recovered a judgment for the sum of $1500, from which the defendant appealed to the Appellate Court for the Second District, where the judgment was affirmed. The railroad company thereupon appealed to this court. The principal question presented in the case arises upon certain instructions given at the instance of the plaintiff, relating to the measure of care, under the circumstances shown by the evidence to have existed, imposed upon the respective parties. The defendant company also objected that the trial court permitted witnesses to give their opinions as to the rate of speed at which the train was running when the accident occurred, and that the widow of the deceased was allowed to testify that she and a minor child were entirely dependent on his labor for their support.

Mr. CHARLES WHEATON, for the appellant:

To warrant a recovery, the party injured must have exercised ordinary care, or the injury must have been wantonly inflicted. *Chicago and Northwestern R. R. Co.* v. *Sweeney*, 52 Ill. 325; *Chicago and Alton R. R. Co.* v. *Gretzner*, 46 id. 74; *Chicago, Burlington and Quincy R. R. Co.* v. *Van Patten*, 64 id. 510; *Illinois Central R. R. Co.* v. *Green*, 81 id. 19; *Chicago, Burlington and Quincy R. R. Co.* v. *Lee*, 68 id. 576; *Illinois Central R. R. Co.* v. *Hetherington*, 83 id. 510; *Chicago, Burlington and Quincy R. R. Co.* v. *Colwell*, 3 Bradw. 548; *Lake Shore and Michigan Southern R. R. Co.* v. *Berlink*, 2 id. 427; *Town of Earlville* v. *Carter*, 2 id. 34.

The running of a train at a rate of speed prohibited by ordinance, raises no presumption the injury was willful or wanton. *Illinois Central R. R. Co.* v. *Hetherington*, 83 Ill. 510; *Artz* v. *Chicago, Rock Island and Pacific R. R. Co.* 34 Iowa, 153; *Railroad Co.* v. *Hunton*, 33 Ind. 335; *Railroad Co.* v. *Houston*, 5 Otto, 697.

Nor does the omission to ring the bell or sound the whistle raise such presumption. *Chicago, Burlington and Quincy*

R. R. Co. v. *Lee*, 68 Ill. 576; *Chicago, Rock Island and Pacific R. R. Co.* v. *McKean*, 40 id. 218.

The witnesses who were allowed to testify to the speed of the train were not shown to have been competent to give an opinion. A witness must have some knowledge of that concerning which he gives an opinion. *Cooper* v. *Randall et al.* 59 Ill. 317; *Chicago and Northwestern R. R. Co.* v. *Ingersoll et al.* 65 id. 399.

And it must be shown that he was competent to give an opinion. *Chicago and Alton R. R. Co.* v. *Springfield and Northwestern R. R. Co.* 67 Ill. 142.

The instructions given for the plaintiff do not state the law of comparative negligence correctly, and were calculated to mislead. The fact that proper instructions were given for the defendant will not cure the error in those given for the plaintiff. *Camp Point Manufacturing Co.* v. *Ballou*, 71 Ill. 417; *Ottawa, Oswego and Fox River Valley R. R. Co.* v. *McMath*, 4 Bradw. 356; *Morris* v. *Gleason*, 1 id. 510.

The court erred in admitting evidence that the widow and minor child of the deceased were entirely dependent upon his labor for their support. *Chicago, Rock Island and Pacific R. R. Co.* v. *Henry*, 7 Bradw. 322; *Eagle Packet Co.* v. *Defries*, 94 Ill. 598.

Mr. A. C. LITTLE, and Mr. RANDALL CASSEM, for the appellee:

The defendant was guilty of gross negligence in running its train at a rate of speed prohibited by ordinance, and dangerous to the public safety, at the time and place when it killed the plaintiff's intestate. *Chicago and Alton R. R. Co.* v. *Gregory*, 58 Ill. 256; *Chicago and Alton R. R. Co.* v. *Beacher*, 84 id. 483; *Toledo, Peoria and Warsaw R. R. Co.* v. *Deacon*, 63 id. 91; *Wabash Ry. Co.* v. *Henks*, 91 id. 412.

Any person of ordinary knowledge may testify to his judgment of the speed of a train or vehicle. That is not a ques-

tion for experts. *Salter* v. *Utica and Black River R. R. Co.* 59 N. Y. 631; *Detroit R. R. Co.* v. *Van Steinberg*, 17 Mich. 99.

Facts discernible by judgment or estimate, but not requiring special knowledge or skill, are not regarded as matters of opinion. Abbott's Trial Evidence, 587.

Irrespective of any ordinance, it is the duty of a railroad company to run its trains, while in a city or village, with reference to public safety, and at such a speed as to have them under control to avoid injury, and a failure to do so is gross negligence. *Wabash Ry. Co.* v. *Henks*, 91 Ill. 412; *Chicago and Alton R. R. Co.* v. *Engle*, 84 id. 399.

Counsel reviewed the evidence to show that plaintiff's intestate was not guilty of negligence under the circumstances, or that it was slight, if any, but contended that whether or not he was, was a question of fact for the jury, citing *Grayner* v. *Old Colony and Newport Ry. Co.* 100 Mass. 208; *Indianapolis and St. Louis Ry. Co.* v. *Evans*, 86 Ill. 63; *Chicago and Alton R. R. Co.* v. *Pennell*, 94 id. 448.

The jury having found on that question in favor of plaintiff, this court should not disturb the finding. *Illinois Central R. R. Co.* v. *Benton*, 69 Ill. 174.

No objection was taken on the trial as to the evidence of the pecuniary circumstances of the widow and child of the intestate, and it can not be urged in this court. *Littech* v. *Mitchell*, 73 Ill. 603; *Wickencamp* v. *Mitchell*, 77 id. 92; *Gillespie* v. *Smith*, 29 id. 473.

It was competent and proper to show how much plaintiff's intestate earned, and that he left a wife and minor child who shared his income. *Chicago and Northwestern R. R. Co.* v. *Moranda, Admx.* 93 Ill. 302.

The injured party guilty of want of ordinary care may still recover if the carelessness has been gross and his slight in comparison therewith. *Chicago and Northwestern Ry. Co.* v. *Clark*, 70 Ill. 276; *East St. Louis Packing and Provision Co.* v. *Hightower*, 92 id. 139; *Chicago, Burlington and Quincy*

R. R. Co. v. *Howard*, 90 id. 425; *Village of Kewanee* v. *Depew*, 80 id. 119; *Jacksonville and St. Louis R. R. Co.* v. *Grabble*, 88 id. 242; *Chicago and Northwestern Ry. Co.* v. *Dimick*, 96 id. 42.

The jury are the judges of the relative carelessness. 8 Bradw. 135.

To instruct the jury that if the plaintiff failed to exercise ordinary care he was guilty of gross negligence, and that if injured for want of ordinary care, etc., no action will lie, unless defendants wantonly or willfully, etc., is unsound law. *Stratton* v. *Central City Horse Ry. Co.* 96 Ill. 25.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The declaration contains two counts. In the first the allegation is general that the defendant negligently drove and managed its locomotive, etc. In the second the negligence alleged is in driving its engine, etc., at a rate of speed prohibited by an ordinance of the town of Plano.

At the time he received the fatal injury, plaintiff's intestate was in the employ of a firm engaged in the manufacture of the "Marsh Harvester," at the shops of the company of that name, at Plano. For the convenience of those in charge of these shops, a switch had been laid on the grounds of the Marsh Harvester Company, connecting with defendant's main track, which was used by those in charge of the shops for unloading materials shipped to the shops, and for loading machines to be shipped from the shops. In one of the buildings used for shops was a saw room, the door of which opened towards this switch, and within ten or twelve feet of it. It was the duty of plaintiff's intestate, in conjunction with several others, to take lumber out of the saw room by that door and across the track to another part of the grounds of the "Harvester" Company. While thus occupied, and as he was passing over this switch with a load of lumber on his shoulder, one of the defendant's trains, which was being backed along the side-track, struck and instantly killed him.

The evidence tended to show that the defendant did the switching for the shops twice a day, at fixed regular hours, which were generally known to the employés in and about the shops; that the plaintiff's intestate had been engaged in the performance of the duties that he then was performing, for several months; that others saw the approaching train and gave him warning, and that, by looking in the proper direction, the train could have been observed in time to have avoided the injury. As to the weight of this evidence, it is not our province to express any opinion. It is sufficient to state there was evidence of this tendency before the jury. There was also a conflict in the evidence as to the rate of speed at which the train was moving,—some evidence tending to show that it was less than that allowed by the ordinance of the town of Plano, and some tending to show that it was greater.

Among other instructions given by the court at the instance of the plaintiff, were the following:

"1. The jury are instructed that the fact that a municipal corporation by ordinance prohibits the running of engines, locomotives and railway trains at a certain rate of speed, as, per example, six miles an hour, through its corporate territory, does not warrant or license the running of such trains at such rate of speed. It is the duty of those having the management and control of such engines, locomotives and trains, to conform the rate of speed to the safety of the public at all places where such a rate of speed would probably cause the death of individuals or endanger their personal safety. If, therefore, the jury believe, from all the evidence in this cause, that the defendant at the time, and on the said side-track where said Johnson was killed,—if the proof shows that Johnson was killed on the side-track in question,—was running its said train of cars and locomotive at a rate of speed dangerous to the personal safety of those whose right

and privilege it was to cross said side-track, and that by reason of such dangerous rate of speed of said locomotive engine and cars, plaintiff's intestate, who was in the exercise of reasonable prudence and care, was struck, run over and killed by said defendant, the verdict should be for plaintiff, and the jury should so find. But if the jury believe from the evidence that Johnson did not exercise ordinary care, yet that Johnson's negligence was slight and that the negligence of the defendant was gross in comparison with each other, then the plaintiff must recover, and the verdict must be for the plaintiff.

"2. The court instructs the jury that railroad companies in cities and thoroughfares where there are many persons frequently passing over their tracks, are under legal obligations to regard the safety of such persons, and must conduct their trains and regulate their speed with reference to the safety of the public at such places, or be liable for damages resulting from such negligence or willfulness. If, therefore, the jury believe, from all the evidence in this cause, that the said Christian L. Johnson was killed by said defendant, its agents or employés, without negligence on his part, by reason of the rapid and unlawful running of one of its trains, as in plaintiff's declaration charged, the verdict should be for plaintiff. But if, from all the evidence, it should appear that Johnson was not exercising ordinary care, yet the plaintiff may recover if Johnson's negligence was slight and that of defendant was gross in comparison with each other, and the verdict must be for plaintiff.

"3. The jury are instructed that if they believe, from all the evidence in this cause, that at the time of the alleged killing of the said Christian L. Johnson, the said killing took place at and within the corporate limits of the town of Plano, in the county of Kendall, and State of Illinois, and that at said time there was in force a valid ordinance in said incorporated town, prohibiting the running in the corporate

limits of said town at a greater rate of speed than six miles per hour, locomotives, engines and freight trains, and if the jury further believe, from all the evidence in this cause, that at said time and place the defendant was running one of its engines, with cars attached, at a greater rate of speed than was permitted by said ordinance, and that by reason of such unlawful rate of speed, if such speed is shown by the proof, the said Johnson, without fault or negligence on his part, was killed, the verdict of the jury should be for the plaintiff. But if, from all the evidence in this cause, it appears the plaintiff's intestate, Johnson, was not exercising ordinary care, yet the plaintiff may recover, provided the jury believe that Johnson's negligence was slight and the negligence of the defendant gross in comparison with each other, then the verdict must be for plaintiff."

No question arises under these instructions with regard to the measure of care it would have been the duty of the defendant to have observed, if it had been within the power of the defendant to have avoided the consequences of the negligence of the plaintiff's intestate. Such a question would have required proof of knowledge in those in charge of defendant's train, of the peril in which plaintiff's intestate had placed himself, at least long enough before the injury inflicted to have enabled them to have formed an intelligent opinion as to how the injury might be avoided, and apply the means, or the equivalent of such knowledge—of which there is no pretense in this case; and it would, obviously, involve legal principles not necessary to be now discussed. But the question here relates simply to the doctrine of comparative negligence in a case wherein the injured party was a coöperative cause of the injury,—in other words, where his acts directly contributed, in conjunction with the acts of the defendant, to the injury.

The doctrine has been announced, and often reiterated in this court, that in order to authorize the plaintiff to recover

on the ground of the mere negligence, as distinguished from the willful tort, of the defendant, it must appear that the party injured exercised ordinary care, such as a reasonably prudent person will always adopt for the security of his person or property, to avoid the injury complained of. In the *Jacobs case*, 20 Ill. 488, where the doctrine of comparative negligence was first announced, one of the rulings is: "To maintain an action for negligence there must be fault on the part of the defendant, and no want of ordinary care on the part of the plaintiff." And so it was ruled in *Chicago, Burlington and Quincy R. R. Co.* v. *Hazzard*, 26 Ill. 373; *Chicago, Burlington and Quincy R. R. Co.* v. *Dewey, Admx.* id. 255; *Illinois Central R. R. Co.* v. *Simmons*, 38 id. 242; *Chicago and Alton R. R. Co.* v. *Gretzner*, 46 id. 76; *Chicago and Northwestern R. R. Co.* v. *Sweeney*, 52 id. 325; *Chicago, Burlington and Quincy R. R. Co.* v. *Damerell et al.* 81 id. 450; *Chicago, Burlington and Quincy R. R. Co.* v. *Lee*, 68 id. 580. In the case last cited it was said, after stating the rule of comparative negligence: "It is an essential element to the right of action in all cases, the plaintiff, or party injured, must himself exercise ordinary care, such as a reasonably prudent person will always adopt for the security of his person or property. There are and there can be no degrees of gross negligence. The cases all go to the length of holding, where a party has been injured for the want of ordinary care, no action will lie unless the injury is willfully inflicted." See, also, *St. Louis, Alton and Terre Haute R. R. Co.* v. *Manly*, 58 Ill. 300.

These instructions, it is to be borne in mind, relate to the law of negligence, which, according to the generally approved definition of ALDERSON, B., in *Blyth* v. *Burningham Water Works Co.* 11 Exch. 784, "is the omission to do something which a reasonable man, guided upon those ordinary considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and

reasonable man would not do." See *Railroad Co.* v. *Jones*, 95 U. S. (5 Otto,) 439. Or, according to the more terse definition of this court in *Great Western R. R. Co.* v. *Haworth et al.* 39 Ill. 353: "The opposite of care and prudence—the omission to use the means reasonably necessary to avoid injury to others." When there is a particular intention to injure, or a degree of willful and wanton recklessness which authorizes the presumption of an intention to injure generally, the act ceases to be merely negligent, and becomes one of violence or fraud. "In negligence there is no purpose to do a wrongful act, or to omit the performance of a duty." *Gardner* v. *Heartt*, 3 Denio, 236. "Negligence, even when gross, is but an omission of duty. It is not designed and intentional mischief, although it may be cogent evidence of such an act." *Towanda R. R. Co.* v. *Munger*, 5 Denio, 267. See, also, Wharton on Negligence, secs. 1, 2, 3.

In holding the plaintiff may recover in an action for negligence, notwithstanding he has been guilty of contributive negligence, where his negligence is but slight and that of the defendant gross in comparison with each other, it must, of course, be understood the terms "slight negligence" and "gross negligence" are used in their legal sense, as defined by common law judges and text writers, for otherwise the terms would convey no idea of a definite legal rule. As defined by those judges and writers, these terms express the extremes of negligence. Beyond gross and slight there are no degrees of negligence. "Gross gross," "grosser gross," and "grossest gross," and "slight slight," "slighter slight," and "slightest slight," are absurd, and, in a legal sense, impossible terms. What is less than slight negligence the law takes no cognizance of as a ground of action, and beyond gross negligence the law, while recognizing there may be liability for a trespass because of a particular intention to do wrong, or of a degree of willful and wanton recklessness which authorizes the presumption of a general intention to

do wrong, recognizes no degree of negligence. The definition of gross negligence itself proves that it is not intended to be, the subject of comparison. It is, "the want of slight diligence." Slight negligence is, "the want of great diligence," and intermediate there is ordinary negligence, which is defined to be "the want of ordinary diligence." Story on Bailments, sec. 17; Shearman & Redfield on Negligence, (2d ed.) secs. 16, 17; Cooley on Torts, 631; *Central Military Tract R. R. Co.* v. *Rockafellow*, 17 Ill. 541.

In applying the measure of slight and gross negligence to the acts of the respective parties charged to have been negligent, it is, of course, always to be held in remembrance that the term "negligence" is, itself, relative, "and its application depends on the situation of the parties, and the degree of care and vigilance which the circumstances reasonably impose." (Cooley on Torts, 630.) The question, therefore, in the present instance, related to the measure of care, under the circumstances shown by the evidence to have existed, imposed upon the respective parties. It was to that measure of care that these instructions related, and if they had related to any other, they would, for that cause alone, have been erroneous.

The word "diligence," as used in the definitions of the degrees of negligence to which we have referred, is synonymous with "care." This is shown by the text in Story, immediately following the definitions quoted. It is there said: "For he who is only less diligent than very careful men, can not be said to be more than slightly inattentive; he who omits ordinary care, is a little more negligent than men ordinarily are; and he who omits even slight diligence, fails in the lowest degree of prudence, and is deemed grossly negligent." It can not, then, legally be true, that where the plaintiff fails to exercise ordinary care, and the defendant is guilty of negligence only, the plaintiff's negligence is slight and that of the defendant gross in comparison with each other.

We have seen, and we repeat, the measure is to be applied with reference to the rights, duties and obligations of the respective parties, under the peculiar circumstances in evidence. Whether, therefore, the plaintiff's intestate failed to exercise ordinary care, is to be determined—and there can be no presumption under these instructions otherwise—with reference to his rights, duties and obligations, and the rights, duties and obligations of the defendant, under the peculiar circumstances here in evidence. Being thus determined that he has failed to exercise ordinary care, the legal conclusion is, he is guilty of ordinary negligence. The utmost degree of negligence, merely,—and it is of this only, and not of trespass or other wrongs, that the instructions speak,—of which the defendant can be guilty, is gross negligence. The plaintiff's negligence, then, by the very terms employed, is ordinary, and that of the defendant gross, in comparison with each other. The language employed, in effect, says, although, as to this particular act, the plaintiff's intestate was guilty of ordinary negligence, and the defendant guilty of gross negligence, still, if the jury believe the plaintiff's intestate's negligence was slight,—that is, that it was not what the very terms employed admit it to have been,—and that of the defendant gross, in comparison with each other, they will find the defendant guilty, etc. Surely it needs no demonstration that if, as to a particular act, the negligence of the plaintiff was ordinary and that of the defendant gross, their relation is not changed by comparing them with each other. The same evidence that determines the one is gross and the other ordinary, fixes their relative degrees with reference to each other.

It seems to be thought what is said in *Stratton* v. *Central City Horse Ry. Co.* 95 Ill. 25, in criticising certain instructions there given, sustains the ruling below in regard to these instructions. This is a misapprehension. In those instructions it was said a failure to exercise ordinary care was gross

negligence, and in one it was said no action would lie if the plaintiff failed to exercise ordinary care, unless the defendant willfully inflicted the injury. We have before herein shown both these positions to be inaccurate. The failure to exercise ordinary care is only ordinary negligence, and although a plaintiff might not exercise ordinary care, yet the defendant would be liable for injuring him if his act causing injury was so willfully and wantonly reckless as to authorize the presumption of an intention to injure generally, notwithstanding he might have had no special intention to injure the plaintiff.

These instructions are clearly erroneous in the respect pointed out, and must necessarily have misled the jury as to the doctrine of comparative negligence. There is in them, moreover, a manifest attempt to connect discordant propositions, which always tends to confusion. Attempts to blend separate and distinct legal propositions in the same sentence or paragraph usually cause error, in that such blending tends to confuse and mislead, and should be avoided.

The objection taken to the admission of evidence with regard to the speed of the train, is not tenable. This is clearly a subject upon which any one is entitled to express an opinion, the jury being presumably able to estimate it for what it was worth. Nor can we say that the evidence of the poverty of the family of the deceased did any harm, although it was technically erroneous to admit it. In a future trial this error can and should be avoided.

For the error in giving the first, second and third of the plaintiff's instructions the judgment is reversed, and the cause remanded.

Judgment reversed.

Mr. JUSTICE DICKEY: I concur in the judgment rendered in this case. While the evidence tends to charge the defendant with palpable negligence, still, in my judgment, there is no evidence tending to show gross negligence on the part of

defendant, and the turning question in the case in fact seems to be, whether the plaintiff's intestate used ordinary care. In such a case I think it error to submit to the jury the rule of law as to comparative negligence. On this ground the judgment ought to be reversed.

There is, however, a line of thought in the opinion prepared by Mr. Justice SCHOLFIELD, which I think a departure from the law as laid down by this court ever since the decision of the *Jacobs case*, in 20 Ill.

I do not think that the terms "slight negligence," and "gross negligence," as used in the opinion delivered in the *Jacobs case*, and in the long series of cases which have followed that case, were used in the sense of the definitions quoted from Story, in his treatise on Bailments. That author, in the same work, says: "There are infinite shades of care or diligence, from the *slightest momentary thought*, to the *most vigilant anxiety*. There may be a high degree of diligence, a common degree of diligence, and slight degree of diligence." He defines "ordinary diligence" as "that degree of diligence which men in general exert in respect to their own concerns." He defines "extraordinary diligence" as "that which *very* prudent persons take of their own concerns." And he says "slight diligence" is "that which persons of any prudence at all take of their own concerns." All this is readily understood,—is in harmony with the common meaning of the words used; but when he says, in section 17, that "ordinary negligence" may be defined to be "the want of ordinary diligence," and "slight negligence" to be "the want of great diligence," and "gross negligence" to be "the want of slight diligence," he surely does not give to these phrases the meaning in which they are used in a common or popular sense, or the meaning in which they have generally been used by this court in the *Jacobs case*, and other kindred cases; nor does he give the meaning which would naturally be adopted by a jury in giving effect to an instruction given by

the court. Giving the words their popular sense, it would rather seem that ordinary negligence would be such negligence as men of common prudence indulge in, which betokens only the exercise of ordinary care, and not the want of ordinary care, as is suggested. This, where the law requires only ordinary care, is not negligence at all, for in law negligence is always faulty. It is the failure in some degree to use that care which the law requires under the circumstances. In a case where the law demands only the use of ordinary care, and ordinary care is actually exercised, there is in law no negligence whatever. In such case it is not true that the want of great diligence is in law slight negligence. In the popular sense of the words, slight negligence is a slight want of the care which the circumstances demand. A man obviously, therefore, may in such case fail slightly to use ordinary care, and in the popular sense of the words he would be guilty of slight negligence, and only slight negligence, and this, although he did not do all that ordinary care required. And so of "gross negligence." Its popular meaning is a very great failure to use the care which the law requires. It is not essential to gross negligence that there shall be an utter want of care, or, in the language of Story, "the want of" even "slight diligence." The exercise of slight diligence, where the highest degree of care is by law required, may still leave the party guilty of gross negligence,—that is, guilty of a very great failure to exercise the highest care.

Nor do I concur in the *dicta* which say there are and can be no degrees in gross negligence, and no degrees in slight negligence. The adjectives "slight," and "gross," seem to me to be capable of comparison, as most adjectives are. I see no absurdity in saying "gross," "more gross," "most gross," or "gross," "grosser," "grossest," or "slight," "more slight," "slightest." In fact in the quotation *supra*, from Story, he speaks of "infinite shades of care," from the "*slightest*" momentary thought to the "most vigilant solicitude."

In fact, the imperfection of these definitions of Story leads Cooley, in his work on Torts, page 630, to say of this classification, that it "only indicates that under the special circumstances great care or caution was required, or only ordinary care, or only slight care;" and to add, "if the care demanded was not exercised, the case is one of negligence." The terms "slight negligence," or "moderate negligence," or "gross negligence," do not indicate offences of a different nature, but different degrees in offences of the same nature.

I think, therefore, there may be cases in which it may be legally true that the plaintiff has failed *in some degree* to exercise ordinary care, and that in the same case the defendant has been guilty of gross negligence wherein the plaintiff's negligence may be slight,—that is, may consist of a slight failure to use ordinary care,—and that of the defendant gross in comparison therewith. To my mind the proposition that a plaintiff's negligence is slight, is not incompatible with the proposition that he has failed in some degree to use ordinary diligence.

I pursue this discussion no further here, for the reason that in my judgment the propriety of adopting in this connection Mr. Story's definitions, is a question which does not come in judgment in this case.

HENRY H. GAGE

v.

GEORGE W. PARKER.

Filed at Ottawa March 28, 1882—Rehearing denied September Term, 1882.

1. CHANCERY—*amendment of bill—multifariousness.* After the filing of an original bill to set aside a sale of lots for unpaid special assessments, on the ground that the ordinance under which the assessment was made was illegal and void, a supplemental bill was filed showing a subsequent sale of

103 528
197 16
103 528
53a 186
103 528
142 299
145 123
146 351
103 528
154 218
154 260
103 528
161 99
103 528
157 88
103 528
53a 291
103 528
164 480
103 528
69a 76
103 528
170 439
103 528
178 457
103 528
195 487
103 528
202 38

Syllabus.

103	528
204	[7]473
103	528
214	[1]284
103	528
115a	[5]589

the same property to the same purchaser, and a redemption from such sales within the time provided by law, but that the purchaser had taken out deeds on the sales, which it prayed to have set aside: *Held*, that the supplemental bill was a mere amendment, and as an amendment was proper, and that the bill as amended was not multifarious, the matters in the two bills not being distinct and unconnected.

2. SAME—*retaining bill to grant complete relief—effect of amending bill.* Where a court of chancery once obtains jurisdiction of a cause on any equitable ground, a subsequent amendment of the bill asking other relief will not deprive the court of jurisdiction to grant complete relief. When the court acquires jurisdiction for one purpose, it may go on and do complete equity between the parties.

3. SAME—*ground of jurisdiction—distinguished from bill to remove a cloud upon title.* To give a court of equity jurisdiction of a bill solely to quiet title, or remove a cloud from the title, the complainant must allege and prove possession of the premises, or that they are unimproved and unoccupied.

4. But where a bill was originally filed by the owner of land for the purpose of enjoining the execution and delivery of a deed therefor upon an alleged void special assessment, it is not to be regarded as a bill to quiet title or remove a cloud, and does not fall within the rule stated as governing that class of bills. Nor will the character of the jurisdiction in that regard be considered as modified by the filing of a supplemental bill, setting up that the complainant had redeemed from the sale under the alleged void assessment, and that after such redemption the purchaser had taken out a deed, and praying that such deed be set aside and canceled.

5. EVIDENCE—*questioning judicial proceedings collaterally—confirmation of special assessment.* A party by suffering judgment of confirmation of a special assessment upon his property by a court of record, is estopped in a collateral proceeding from showing the illegality of such assessment by reason of the insufficiency of the ordinance on which it is based.

6. SAME—*proof of ownership of land—sufficiency.* While a complainant must prove every material allegation of his bill which is denied, yet when his ownership of lots, in respect of which relief is sought, is not a mooted question, his testimony that he purchased the property originally with his own money from C D, in connection with the deed made to him by C D, may be regarded as sufficient proof of ownership.

7. SAME—*to prove redemption from tax sale.* The book of tax sales and redemptions which the county clerk is required to keep, and in which to enter all sales for taxes, the quantity sold, name of purchaser, etc., and the name of the person redeeming, the date and amount of the redemption money, is competent evidence of the facts therein entered, and of a redemption appearing therein.

Brief for the Appellant.

8. REDEMPTION—*from sale of land for taxes.* Where several judgments are rendered at the same time against land for State and county taxes and special assessments, and the land is sold under such judgments in July, August and September of the same year, the sale being continued through these months, this will be regarded as only one sale, and a party attempting to redeem from such sale must pay the penalty provided by the statute. Section 211 of the Revenue law has no application to such a case, but to a case where the same land is again sold for the taxes of a succeeding year.

APPEAL from the Superior Court of Cook county; the Hon. GEORGE GARDNER, Judge, presiding.

Mr. AUGUSTUS N. GAGE, and Mr. HENRY D. BEAM, for the appellant:

New and distinct causes of action accruing after the filing of the original bill can not properly be introduced by amendment or supplemental bill. A party, under the privilege of amending, can not introduce new matters which will constitute a new bill. 1 Daniell's Chancery Practice, 405, and note 5; *Verplanck* v. *Mercantile Ins. Co.* 2 Edw. Ch. 212; *Shields* v. *Barrow*, 17 How. 130.

A plaintiff can not file a supplemental bill to introduce facts which have occurred since the filing of the original bill, upon which a decree can be had without reference to the original bill. *Milner* v. *Milner*, 2 Edw. Ch. 114; *Pinch* v. *Anthony*, 10 Allen, 477; *Chandler* v. *Petit*, 1 Paige, 168; *Land* v. *Cowan*, 18 Ala. 297; *Vaughan* v. *Vaughan*, 30 id. 329; *Fahs* v. *Roberts*, 54 Ill. 192; 2 Daniell's Chancery Practice, 1515.

A bill is multifarious when it seeks to litigate several claims which are in their nature separate and distinct from, and have no relation or dependence upon, each other. Story's Equity Pleading, secs. 271, 530–534; *Ryan* v. *Trustees of Shawneetown*, 14 Ill. 20.

When the plaintiff's title is put in issue by the pleadings, he must prove it. *Wing* v. *Sherer*, 77 Ill. 200.

Brief for the Appellee.

The bill fails to allege that complainant was in possession of the lots, or that the same were unimproved and unoccupied, and hence fails to show equitable jurisdiction. *Hamilton* v. *Quimby*, 46 Ill. 90; *Hardin* v. *Jones*, 86 id. 313; Rev. Stat. 1874, p. 204, sec. 50.

The complainant is estopped by the judgment confirming the special assessment from disputing its validity or questioning its correctness. *People* v. *Brislin*, 80 Ill. 423; *Lehmer* v. *People*, id. 601; *Prout* v. *People*, 83 id. 154; *Chicago and Northwestern Ry. Co.* v. *People*, id. 467; *Andrews* v. *People*, id. 529.

The evidence in the record shows that no redemption was made, the sum deposited not being sufficient. Rev. Stat. 1874, chap. 120, sec. 210. The law contemplates but one annual sale, though the judgment may be for several distinct taxes and special assessments, and the several sales in law constitute but one sale for that year.

Mr. J. W. WAUGHOP, for the appellee:

A supplemental bill is proper when new matter has arisen since the filing of the original bill. *Burke* v. *Smith et al.* 15 Ill. 159.

It being in effect but an amendment, forms a part of, and is tried with, the original case. *Mix* v. *Beach et al.* 46 Ill. 314.

When there is a common interest, a common ground for relief, and a common ground for invalidity, the bill is not multifarious. *Gage* v. *Chapman*, 56 Ill. 311; *Finch* v. *Martin*, 19 id. 105.

The complainant did prove title to the property by his own oath and without objection. On bill to remove a cloud from the title to land, an equitable title is all that is required to support the allegation of ownership. *Hempstreet* v. *Burdick*, 90 Ill. 444.

The prime object of the bill in this case was not to remove a cloud, but to set aside the tax deeds as void, and issued without authority of law. This general jurisdiction of courts of chancery is asserted in *Gage* v. *Rohrbach*, 56 Ill. 262; *Reed* v. *Tyler et al.* id. 288; *Gage* v. *Chapman*, id. 311; *Emery* v. *Cochran*, 82 id. 65; *Farwell* v. *Harding*, 96 id. 32.

When equity acquires jurisdiction for one purpose, it will retain it for all purposes necessary to do complete justice between all parties. *Conklin* v. *Foster*, 57 Ill. 105; *Sherlock* v. *Village of Winnetka*, 59 id. 389.

The ordinance is void for indefiniteness as to the nature and character of the proposed improvement. Ordinances less objectionable have been held void for indefiniteness in describing the work to be done. *Foss* v. *City of Chicago*, 56 Ill. 354; *Jenks* v. *City of Chicago*, id. 397; *Andrews* v. *City of Chicago*, 57 id. 239; *Wright* v. *City of Chicago*, 60 id. 312; *Page* v. *City of Chicago*, id. 441; *Bryan* v. *City of Chicago*, 60 id. 507.

The county clerk's certificate of redemption was competent evidence of that fact. *Henrichsen* v. *Hodgen*, 67 Ill. 179. The redemption was properly made by paying the penalty only on the last sale.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court:

The property in question, consisting of the north half of lots 13 and 14, Bailey's subdivision of a certain twenty-acre tract in Hyde Park, Cook county, Illinois, was sold on the 9th day of October, 1874, in payment of a special assessment made by the village of Hyde Park, known as No. 7, for the purpose of constructing a brick sewer on Fifty-first street. At the sale Henry W. Gage became the purchaser, for the sum of $136.40. On the 5th day of October, 1876, George W. Parker, who claimed to be the owner of the property, filed this bill to set aside the sale, mainly on the ground that the ordinance under which the assessment was made was illegal

and void. In 1881 the complainant in the original bill filed a supplemental bill, in which, after restating the original case, he alleged, in substance, that at the annual tax sale of 1877 said half lots were again sold for certain delinquent taxes and special assessments, and that Gage became the purchaser. It was then set up that complainant had, within the time provided by law, redeemed the premises from said sales, but after the redemption was made Gage had taken out deeds on the sales. These deeds the bill prays may be set aside and canceled.

It is first urged that it was error to allow the supplemental bill to be filed, and the bill, as amended by the supplemental bill, was multifarious. The supplemental bill was a mere amendment of the original bill, which brought before the court a subsequent sale of the same land purchased by the same party. As the parties were the same, and the same land involved, and the subject matter of the litigation the same, we think the amendment was proper. Nor do we regard the bill as being multifarious. Story (sec. 271) says: "By multifariousness in a bill is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them, as, for example, the uniting in one bill of several matters perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature, against several defendants in the same bill." The matters in the original bill and supplemental bill were not distinct and unconnected. The whole controversy in the case is in regard to the same land, and in reference to taxes, and we perceive no good reason why the whole matter may not properly be united in one bill.

It is next urged that complainant failed to prove title to the premises. It is alleged in the bill that complainant owned the premises, and denied in the answer. Of course complainant was bound to prove every material allegation in the bill which was denied. This was not, however, a

mooted question in the case, and appellee's evidence, that he "purchased the property originally with his own money from E. Bailey," in connection with the deed made to him, may be regarded as sufficient.

It is next urged that the decree is erroneous, because complainant neither alleged nor proved possession of the premises, or that the same were unimproved or unoccupied, or that the defendant was not in possession thereof. If this was a bill solely to quiet title or remove a cloud from the title, then, under sec. 50, Rev. Stat. 1874, page 204, and the ruling in *Hardin* v. *Jones*, 86 Ill. 313, the point would be well taken. Such, however, is not the case. The object of the bill, as originally filed, was not to quiet title or remove a cloud, but to enjoin the execution and delivery of a deed upon an alleged void special assessment. The court, as a court of equity, acquired jurisdiction to grant the relief under this head, and the fact that an amendment was subsequently made to the bill, under which other relief was asked, did not deprive the court of jurisdiction to proceed and grant complete relief. It is a familiar rule in equity, that where the court acquires jurisdiction for one purpose, it may go on and do complete equity between the parties. This case does not form an exception to the rule.

The ordinance under which the assessment was made, provided: "Whereas, heretofore, on the 1st day of July, 1871, an ordinance was adopted by the town of Hyde Park, providing for the construction of a brick sewer on Fifty-first street, from Lake Michigan to State street, as set forth in the following ordinance, the cost of which was estimated at $75,000, the actual cost of which will exceed the estimated cost; now, therefore, be it ordained, that the following improvement be completed: That a sewer be constructed on Fifty-first street, from Lake Michigan to State street, said sewer to be of sewer-brick; inside diameter five feet from Lake Michigan to Hyde Park avenue; four feet nine inches

from Hyde Park avenue to Madison avenue; four feet six inches from Madison avenue to Woodland avenue; four feet three inches from Woodland avenue to Drexel avenue; four feet from Drexel avenue to Cottage Grove avenue; three feet nine inches from Cottage Grove avenue to the center of the park; three feet six inches from the center of the park to Kankakee avenue; three feet three inches from Kankakee avenue to Indiana avenue; three feet from Indiana avenue to Michigan avenue; two feet nine inches from Michigan avenue to Wabash avenue; and two feet six inches from Wabash avenue to State street,—suitable man-holes and catch-basins to be built, and that a permanent and suitable protection at the lake outlet be constructed, and connected with said sewer; that the cost of said improvement be defrayed by a special assessment, to be made in accordance with law; that commissioners be appointed to estimate the cost of said improvement."

The 19th section of article 9 of the act in relation to cities, villages and towns, under which the town of Hyde Park passed the ordinance, declares: "Whenever such local improvements are to be made wholly or in part by special assessment, the council, in cities, or board of trustees, in villages, shall pass an ordinance to that effect, specifying therein the nature, character, locality and description of such improvement." It is contended that this ordinance did not comply with the requirements of the section of the statute *supra*, and hence the assessment was illegal, under the ruling of this court in *Lass* v. *Chicago*, 56 Ill. 354, and other like cases. We shall not, however, stop to pass upon the validity of the ordinance, as complainant is not in a position to question its validity. It appears that the assessment was made under the ordinance, and a return made to the county court of Cook county, where, on the 24th day of November, 1873, after due notice, it was confirmed, except as to the land of certain persons who appeared and filed objections, complain-

ant not being one of them. Is complainant concluded by the judgment of confirmation?

In *People* v. *Brislin*, 80 Ill. 423, where it was contended that the assessment was illegal, because not on contiguous property, it was said: "This question, and all others bringing up the levy and assessment, have been passed upon by the circuit court, and are *res judicata*, and can not now be made in this court. Upon these there is a judgment passed by a court of competent jurisdiction, and there they must rest." This case has been followed by a number of other decisions, where the same doctrine has been announced. *Lehmer* v. *The People*, 80 Ill. 601; *Prout* v. *The People*, 83 id. 154; *Chicago and Northwestern Ry. Co.* v. *The People*, id. 467; *Andrews* v. *The People*, id. 529.

If the assessment was illegal from the fact that it was based upon an insufficient ordinance, it was the duty of the complainant in the bill to appear before the county court when the application was made to confirm the assessment, and there make the objection; but as he failed to do so, this judgment of the county court, when called in question collaterally, must be regarded as conclusive.

We now come to that branch of the case made by the supplemental bill. In 1877 the half lots became delinquent for State and county taxes, and for certain special assessments which had before that time been levied against the property. The county collector, as required by the statute, made application to the county court for judgment against the half lots, and for an order of sale in satisfaction of the taxes and special assessments then due and unpaid. Judgments were obtained, and a precept issued. The sale of lands was commenced on the 23d day of July, 1877, and was continued until the latter part of October. The lands in question were sold on a part of the judgments, July 28, 1877, and on another portion, August 14, and on the remaining judgments, September 3, 1877. It appears, from the

evidence, that the sale was regularly adjourned from day to day, from the time it was commenced until the close, in October, and that the lots in question were sold as they were reached in the regular order in which the sale was conducted. It is alleged in the bill that the lands were redeemed from these tax sales, and in support of this allegation certain certificates of redemption, executed by the county clerk, were read in evidence. These certificates, defendant contends, are not authorized by the statute, and are not competent evidence to prove any fact. Whether the certificates of redemption are technically competent evidence, we shall not stop here to determine. The statute requires the county clerk to keep a book, in which it is made his duty to make a record of lands sold at tax sale, the quantity sold, name of purchaser, etc., and when the property is redeemed the clerk shall enter the name of the person redeeming, the date and amount of redemption, in the proper column. (Rev. Stat. 1874, chap. 120, sec. 197.) The book in which the sale and redemption were entered in this case was read in evidence, and if the certificates of redemption were not competent evidence, the book was, and the same facts were established by the book as were sought to be proven by the certificates of redemption.

This brings us to the question whether a sufficient amount of money was paid to the county clerk to redeem the lands from the sales. The money was paid to the proper officer, and within the time required, and he received it as a redemption, and issued certificates of redemption, which were delivered to the complainant. But it is urged by the appellant that a sufficient amount was not paid to redeem the lands from the sales. Section 210 of the Revenue law provides, that property may be redeemed from a tax sale "at any time within two years from the time the sale is made, by the owner paying to the county clerk the amount for which the land was sold, and twenty-five per cent, if redeemed before the

expiration of six months; if between six and twelve months, fifty per cent; if between twelve and eighteen months, seventy-five per cent; if between eighteen months and two years, one hundred per cent. The person redeeming shall also pay the amount of all taxes and special assessments accruing after such sale, with ten per cent interest thereon from the day of payment, unless such taxes or assessments have been paid by or on behalf of the person for whose benefit the redemption is made." The complainant did not comply with this section of the statute, and can not claim a redemption under it, as neither the penalties named in the section nor the subsequent taxes were included in the amount deposited as a redemption.

The complainant, however, claims that the redemption is valid under section 211 of the Revenue law, which declares: "If any purchaser of real estate sold for taxes or special assessment shall suffer the same to be again sold for taxes or special assessment before the expiration of the last day of the second annual sale thereafter, such person shall not be entitled to a deed for such real property until the expiration of a like term from the date of the second sale, during which time the land shall be subject to redemption, upon the terms and conditions prescribed in this act; but the person redeeming shall only be required to pay, for the use of such first purchaser, the amount paid by him. The second purchaser shall be entitled to the redemption money, as provided for in the preceding section." It is contended by the complainant in the bill, that as the property in question was sold in July, August and September, of the year 1877, this section applied, and all he had to do was to pay the penalty on the last sale—the simple amount of the other bids and subsequent taxes. It is clear that the section of the statute cited *supra*, would require a person who purchased at the annual tax sale of 1877, to protect the same property from the annual tax sales of 1878 and 1879, or if he failed to do so, and allowed the

property sold in 1878 or 1879, the owner could redeem from such sale by payment of the amount of the first bid. But we do not understand that the statute has any application to a case like the one here under consideration. The judgments for the State and county taxes and the special assessments in this case were all rendered at the same term, and although the land was sold in July, August and September, it was but one sale, and must be regarded in the same light as if the property which was being sold during the most of three months had all been sold in one day.

It is not contended that any mistake of fact existed in regard to the amount of redemption money paid, and that relief may be granted on that ground, as was done in *Gage* v. *Scales*, 100 Ill. 218. But in the bill the relief is based purely on the ground that a proper redemption was made. We do not think that the evidence establishes a redemption, and the decree setting aside these deeds was erroneous.

The decree will be reversed and the cause remanded.

Decree reversed.

Mr. JUSTICE DICKEY, dissenting:

I do not concur in the conclusion in this case. While I think the officer making sale of this property ought *regularly* to have sold the same upon all of the judgments rendered at the same term, for taxes or assessments, against this land, still the record shows that this was not done. There were *in fact* three different sales, made in different months, the time for redemption from which began to run at three different dates. It happens that the purchaser at each sale is the same man. That, however, can not affect the nature of the sale. I do not think we have any lawful warrant to treat these three sales as one. The purchaser's deeds depend upon the validity of these sales. His deeds must stand or fall with these sales. To sustain his deeds they must be taken to be three separate valid sales. The relief sought is

to set aside these deeds because issued after redemption. If the sales be treated as separate valid sales, then it became the purchaser's duty, in order to entitle himself to the penalties on his first purchase, to protect the property from subsequent sale,—by paying up the other charges on which judgment had been rendered, and upon which no sale had been made. The failure of the purchaser to do this, deprived him, under the statute, of his right to the penalties under the first sale. The same is true of the second sale. (Sec. 211, chap. 120.) If this view be correct, the redemption money was sufficient. When the purchaser, at the sale made in July, suffered the property to be again sold in August, then, by this statute, the time for redemption began to run from the date of the August sale, and when he again permitted this property to be sold in September, and became the purchaser, the time for redemption began to run from the date of the September sale, and the amount required to redeem on the last days of redemption consisted, under this section, of the full redemption money on the amount of the September sale, and in addition the amount actually paid by the purchaser at each of the former sales. This amount was paid. I am not inclined to deprive an owner of his land who has literally complied with the statute as to redemption. This section applies, by its terms, to "any purchaser" at a tax sale who "shall suffer the same to be *again* sold" for taxes "before the end of the second annual sale thereafter." Here the purchaser did "suffer the same to be again sold" before that time.

Syllabus. Statement of the case.

HENRY CHANNON *et al.*

v.

WILLIAM STEWART.

Filed at Ottawa March 28, 1882—Rehearing denied September Term, 1882.

CHANCERY JURISDICTION—*of an account of net profits to determine compensation for services.* Where an employé of a firm is to receive a certain sum per year, and one-half of the net profits of a certain branch of the business, as compensation for his services, a court of chancery will have jurisdiction of a bill by such employé for an account of the partnership, for the purpose of ascertaining the profits of such business, although the complainant is not a partner.

APPEAL from the Appellate Court for the First District; —heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

In December, 1877, appellants, who were doing business in Chicago in the ship-chandlery business, wishing to add to their business a sail-making branch, employed appellee to take charge of and manage the sail-making branch of the business. His compensation, by their agreement, was to be a salary of $700 a year and one-half of the net profits accruing from the sail-making. This contract was for one year—1878. He entered upon his duties and continued without further express contract until February 1, 1880, when by consent he left their service. They had had no full settlement, and in trying to settle, a dispute arose as to certain expenses incurred by appellants, which they claimed inured to the advantage of the sail-making business as well as to that of the ship-chandlery business, and a part of which they insisted should be charged to the sail business as expenses, in fixing the amount of net profits, of which appellee was entitled to one-half.

This is a suit in chancery, brought by appellee, for a settlement of the accounts between him and appellants, and

especially for an adjustment of the amount of the profits in the sail-making business, one-half of which, it is conceded, is to be paid to him as part of the compensation for his services. Issues were formed, and the cause referred to the master to take proofs and state an account. The master's report, stating the accounts in detail, was filed. Exceptions to the report were overruled, and a decree rendered in favor of appellee for $2120.55, and that the outstanding debts, amounting to $119, be sold by appellants, and one-half the proceeds be paid to appellee. Defendants appealed to the Appellate Court, where the decree was affirmed, and they bring the record here for review.

Mr. I. K. BOYESEN, for the appellants:

A general averment of unsettled accounts is insufficient to give a court of equity jurisdiction, and a bill for an account must show either a case of which a court of equity has primary jurisdiction, such as trust, fraud or unsettled partnership accounts, or else such intricate accounts as can not fairly be tried at law. Parsons on Partnership, 77; *Harrington* v. *Churchward*, 6 Jur. (N. S.) 576; 4 C. E. Green, 281; *Darthey* v. *Clemens*, 6 Beav. 165; *Logan* v. *Lucas*, 59 Ill. 237; *Buell* v. *Selz*, 5 Bradw. 120; *Kimball* v. *Walker*, 30 Ill. 503.

Messrs. MOORE & PEET, for the appellee:

This case belongs to a class in which courts of equity have concurrent jurisdiction with courts of law. The accounts ran over two years and a part of a third, and no complete account has been rendered for any period. The defendants were running two branches of business, and the accounts were mixed together in the same books, of which the defendants had the entire possession and control.

The case of *Kimball* v. *Walker*, 30 Ill. 503, applies only to cases where no circumstances whatever can give the court

jurisdiction. *Stout* v. *Cook*, 41 Ill. 477; *Magee* v. *Magee*, 51 id. 500; Daniell's Chancery Practice, 630.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

It is insisted that a court of chancery has not jurisdiction in this case. It is said appellee was not a partner with appellants, and hence the case does not fall under the head of accounts between partners, and that there is not any such complication of accounts as might otherwise call for the intervention of a court of chancery. It is true appellee was not a partner with appellants, but to ascertain his true compensation it is necessary to adjust the accounts of the partnership of appellants, for the amount of the net profits of that business must be ascertained before the true amount of the compensation of appellee can be fixed. Every reason for the adjustment of the accounts between partners, in a court of chancery, applies with equal force in this case, and we think the subject matter is a fit subject for a court of chancery.

As to the merits of this controversy, after a careful examination of the record we are not convinced that any error has been committed by the court by which any wrong has been done to appellants. The controversy relates chiefly to questions of fact. A discussion of the items in detail could subserve no useful purpose. We content ourselves in saying that we find no cause for disturbing the decree.

The judgment of the Appellate Court is therefore affirmed.

Judgment affirmed.

ALEX. W. McCLURE

v.

EDWIN WALKER *et al.*

Filed at Ottawa March 28, 1882—Rehearing denied September Term, 1882.

LIMITATION—WRIT OF ERROR—*in cases arising under the Burnt Records act.* The limitation of twelve months from the entering of the final decree in a suit instituted under the Burnt Records act of 1872, within which a writ of error may be sued out, as provided in the 16th section of that act, applies to cases of that character which may have been determined in an Appellate Court, as well as to cases where the writ of error is sought to be sued out of the Supreme Court to a circuit court.

WRIT OF ERROR to the Appellate Court for the First District.

This was a motion to dismiss the writ of error upon the ground it was not sued out in proper time.

Mr. I. K. BOYESEN, and Mr. A. H. LAWRENCE, for the motion.

Messrs. MERRIAM & WHIPPLE, *contra.*

Mr. JUSTICE MULKEY delivered the opinion of the Court:

This is a motion to dismiss the writ of error on the ground the writ was not sued out within one year after the rendering of the decree, as provided by the 16th section of the act of 1872, commonly known as the Burnt Records act.

It appears that on the 20th of August, 1878, the circuit court of Cook county entered the original decree in this case, and that it was subsequently removed by writ of error to the Appellate Court for the First District, where on the 2d of April, 1879, the decree of the circuit court was reversed, and a final decree entered in the cause by the Appellate Court,

to reverse which, on the 12th of January, 1882, the present writ of error was sued out. As more than twelve months intervened between the rendering of the decree and the suing out of the writ, and as the Burnt Records act was passed before the act establishing Appellate Courts, and consequently judgments in those courts were not specifically mentioned, the question is presented by the present motion whether this case is to be governed by the general limitation law of five years, or the limitation of one year under the Burnt Records act.

While the question is not entirely free from doubt, we are of opinion the object of the legislature in adopting the latter act, and the public interests, will be best subserved by holding the limitation of one year applies, and we accordingly so hold. Had the case been brought from the circuit court to this court, there is no question but that the limitation of one year would apply, and to hold the limitation of five years applies in cases coming from the Appellate Courts to this court, would be to make the period of limitation depend in every case upon the accidental and inconsequential fact of whether the cause came here from the one or the other of those courts, and this could hardly have been intended by the legislature. The construction which we have given the several provisions of the statute relating to this question, makes this period of limitation uniform in all cases arising under the Burnt Records act, without regard to the court from which they may be brought to this court.

The motion to dismiss the writ of error is sustained.

Writ of error dismissed.

WALKER and SCOTT, JJ., dissenting.

Syllabus.

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THE CHICAGO AND EASTERN RAILROAD COMPANY

v.

JAMES FLEXMAN.

Filed at Ottawa May 12, 1882—Rehearing denied September Term, 1882.

1. MASTER AND SERVANT—*liability of master for trespass of servant.* Where a servant goes outside of his employment, and while not acting in pursuance of the authority given him inflicts a willful injury upon one not entrusted to his care by the master, or on one to whom the master owes no duty, the act will be that of the servant alone, and the master can not be held responsible for it.

2. SAME—*carrier's duty to protect passengers—liability for acts of servant.* A carrier, whether by steamboat, railway, or otherwise, is under obligation to convey his passenger safely and properly, and to treat him respectfully, and if he entrusts this duty to his servants, the law holds him responsible for the manner in which they execute the trust.

3. A carrier must not only protect his passengers against the violence and insults of strangers and co-passengers, but also against the violence and assaults of his own servants. If this protection is not afforded, and the passenger is assaulted and beaten through the negligence of the carrier's servants, he will be responsible for the injury, and especially for the assault of his servants.

4. Where a passenger on arriving at the place to which he had paid his fare on a railroad train missed his watch, and supposing it to have been stolen, refused to leave the train until he should recover his watch, and the conductor consented that he might remain on the train until it reached another station, and after the train had started and a partial search had been made, a passenger asked who he thought had his watch, when he replied, "That fellow," pointing at a brakeman, who immediately struck him in the face with a lantern: *Held*, that the facts showed a right of action against the railroad company for the injury inflicted by its servant, and that the company occupied the same position towards the passenger as if he had paid his fare to such other station.

APPEAL from the Circuit Court for the Second District;—heard in that court on appeal from the Circuit Court of Iroquois County; the Hon. FRANKLIN BLADES, Judge, presiding.

Brief for the Appellant.

Mr. WILLIAM ARMSTRONG, for the appellant:

The master is not liable for the willful mischief of his servant, or his acts outside of the line of his employment. *McManus* v. *Cricket*, 1 East, 106; *Croft* v. *Allison*, 4 B. & A. 500; *Lane* v. *Cotton*, 12 Mod. 488; *Middleton* v. *Fowler*, Salk. 282; *Rowe* v. *Birkenhead R. R. Co.* 7 Eng. L. & E. 546; Story on Agency, sec. 456; Wharton on Agency, sec. 540; Angell on Carriers, sec. 604; Cooley on Torts, 533; 2 Kent's Commentaries, 260; *Wright* v. *Wilcox*, 19 Wend. 343; *Vanderbilt* v. *Richmond Turnpike Co.* 2 Conn. 479; *Hibbard* v. *New York and Erie R. R. Co.* 15 N. Y. 455; *Isaac* v. *Third Avenue R. R. Co.* 47 id. 122; *Mott* v. *Consumers' Ice Co.* 73 id. 543; *Evansville and Crawfordsville R. R. Co.* v. *Baum*, 26 Ind. 70; *Indianapolis, Pitts. and Chicago Ry. Co.* v. *Anthony*, 43 id. 183; *Little Miami R. R. Co.* v. *Wetmore*, 19 Ohio St. 110; *Bryant* v. *Rich*, 106 Mass. 180; *Ramsden* v. *B. and A. R. R.* 104 id. 117; *Shirley* v. *Billings*, 8 Bush, 147; *Goddard* v. *Grand Trunk Ry. Co.* 57 Maine, 202; *Johnson* v. *Barber*, 5 Gilm. 425; *Tuller* v. *Voght*, 13 Ill. 277; *Oxford* v. *Peter*, 28 id. 434; *Halty* v. *Markel*, 44 id. 227; *Pritchard* v. *Keefer*, 53 id. 117; *Noble* v. *Cunningham*, 74 id. 51; *Chicago, Burlington and Quincy R. R. Co.* v. *Bryan*, 90 id. 126.

Appellee, at the time of the injury, was a stranger to the appellant, and not a passenger, and was upon the car without payment of his fare.

There is a duty resting upon a passenger to so demean himself towards the servants as not, by misbehavior, to provoke a personal quarrel with them. *Little Miami R. R. Co.* v. *Wetmore*, 19 Ohio St. 133. See, also, *Illinois Central R. R. Co.* v. *Whittemore*, 43 Ill. 420; *Chicago and Northwestern R. R. Co.* v. *Williams*, 55 id. 185; *Chicago, Burlington and Quincy R. R. Co.* v. *Griffin*, 68 id. 499.

Messrs. DOYLE, MORRIS & STEARNS, for the appellee:

It is the duty of a carrier to protect his passenger from violence and insult, from whatever source, and more especially from his own servants. *Goddard* v. *Grand Trunk Ry. Co.* 57 Maine, 202; *Howe* v. *Newmarch*, 12 Allen, 115; Angell & Ames on Corporations, 404; *Moore* v. *Railroad*, 4 Gray, 365; *Seymour* v. *Greenwood*, 7 Hurl. & Nor. 354; *Railroad* v. *Finney*, 10 Wis. 388; *Railroad* v. *Arendiver*, 42 Pa. St. 356; *Weed* v. *Railroad*, 17 N. Y. 362; *Railroad* v. *Derby*, 14 How. 468; *Railroad* v. *Hinds*, 53 Pa. 512; *Flint* v. *Transportation Co.* 34 Conn. 554; *Landreaux* v. *Bell*, 5 La. (O. S.) 275; *Nieto* v. *Clark*, 1 Cliff. 145; *Chamberlain* v. *Chandler*, 3 Mass. 242; *Bryant* v. *Rich*, 106 id. 180; *Chicago and Northwestern Ry. Co.* v. *Croaker*, 36 Wis. 657; *Keokuk Northern Line Packet Co.* v. *True*, 88 Ill. 608.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court:

This was an action brought by James Flexman, against appellant, to recover damages for personal injuries inflicted upon him while a passenger in appellant's cars, by a brakeman in the employ of the company.

The plaintiff, as appears from the evidence, procured a ticket from Hoopeston to Milford, and took passage on a freight train which carried passengers. Soon after plaintiff entered the car he laid down in a seat and went to sleep. When the train arrived at Milford he was notified by the conductor. As plaintiff was about to leave the car he missed his watch, and supposed it had been stolen. He then refused to leave the train until he recovered the watch, and the conductor consented that he might remain on the train until they should reach Watseka. After the train had started, a passenger assisted plaintiff in making a partial search for the watch, but it was not then found. The passenger then inquired of plaintiff who he thought had his watch, to which

he replied, "That fellow," pointing at the brakeman. Immediately after the remark was made the brakeman struck plaintiff in the face with a railroad lantern, inflicting the injuries complained of. These are substantially the facts, over which there is no controversy by the parties.

After the plaintiff had introduced all his testimony, the defendant entered a motion to exclude the evidence from the jury, and asked for an order directing the jury to find a verdict for defendant. The court denied the motion, and the defendant excepted. This decision of the court presents the question whether the facts proven, conceding them to be true, constitute a cause of action against the defendant.

The point is made that as plaintiff only paid fare to Milford he ought not to be regarded as a passenger on the train after he left that place. We do not regard this position well taken. The conductor did not demand or require fare from the plaintiff; had he done so, no doubt the required amount would have been paid. As the conductor failed to call for fare, it must be regarded as waived. At all events, we have no hesitation in holding that the railroad company occupied the same position towards plaintiff that it would have occupied had he paid his fare.

But it is said, "that if the plaintiff was injured by a servant of appellant, it was an act outside of the employment of the servant who committed the act, and not in furtherance of his employment by the master." This position is predicated upon *McManus* v. *Cricket*, 1 East, 106, and like cases which have followed it. In the case cited Lord KENYON said: "It is laid down by HOLT, Ch. J., as a general position, 'that no master is chargeable with the acts of his servant but when he acts in the execution of the authority given him.' Now, when a servant quits sight of the object for which he is employed, and without having in view his master's orders pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and, according to

the doctrine of Lord HOLT, his master will not be answerable for such act." The doctrine announced is no doubt correct when applied to a proper case. If, for example, a conductor or brakeman in the employ of a railroad company should willfully or maliciously assault a stranger,—a person to whom the railroad company owed no obligation whatever, —the master in such a case would not be liable for the act of the servant; but when the same doctrine is invoked to control a case where an assault has been made by the servant of the company upon a passenger on one of its trains, a different question is presented—one which rests entirely upon a different principle.

What are the obligations and duties of a common carrier toward its passengers? In *Keokuk Northern Line Packet Co.* v. *True*, 88 Ill. 608, it was held that a steamboat company, as a carrier of passengers for hire, is, through its officers and servants, bound to the utmost practicable care and diligence to carry its passengers safely to their place of destination, and to use all reasonably practicable care and diligence to maintain among the crew of the boat, including deck hands and roustabouts, such a degree of order and discipline as may be requisite for the safety of its passengers. The same rule that governs a steamboat company must also be applied to a railroad company, as the duties and obligations resting upon the two are the same, or any other company which carries passengers for hire. In *Goddard* v. *Grand Trunk Ry. Co.* 57 Me. 202, in discussing this question, the court says: "The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully; and if he entrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. * * * He must not only protect his passengers against the violence and insults of strangers and co-passengers, but, *a fortiori*, against the violence and insults of his own servants. If this duty to the passenger is not

performed,—if this protection is not furnished,—but, on the contrary, the passenger is assaulted and insulted through the negligence of the carrier's servant, the carrier is necessarily responsible." In *Bryant* v. *Rich*, 106 Mass. 180, where the plaintiff, a passenger on a steamboat, was assaulted and injured by the steward and some of the table waiters, the defendant, as a common carrier, was held liable for the injury. In *Croaker* v. *Chicago and Northwestern Ry. Co.* 36 Wis. 657, where the conductor of a railroad train kissed a female passenger against her will, the court, in an elaborate opinion, held the railroad company liable for compensatory damages. It is there said: "We can not think there is a question of the respondent's right to recover against the appellant for a tort which was a breach of the contract of carriage." In *Shirley* v. *Billings*, 8 Bush, 147, where a passenger on defendant's boat was assaulted and injured by an officer on the boat, the defendant was held liable. See, also, *McKinley* v. *Chicago and Northwestern R. R. Co.* 44 Iowa, 314, and *N. O., St. L. and C. R. R. Co.* v. *Burke*, 53 Miss. 200. Many other authorities holding the same doctrine might be cited, but we do not regard it necessary. It is true there are authorities holding the opposite view, but we do not think they declare the reason or logic of the law, and we are not prepared to follow them.

The appellant was a common carrier of passengers. As such it was not an insurer against any possible injury that a passenger might receive while on the train, but the company was bound to furnish a safe track, cars and machinery of the most approved quality, and place the trains in the hands of skillful engineers and competent managers,—the agents and servants were bound to be qualified and competent for their several employments. Again, the law required appellant, as a common carrier, to use all reasonable exertion to protect its passengers from insult or injury from fellow passengers who might be on the train, and if the agents of appellant in

charge of the train should fail to use reasonable diligence to protect its passengers from injuries from strangers while on board the train, the company would be liable. So, too, the contract which existed between appellant as a common carrier and appellee as a passenger, was a guaranty on behalf of the carrier that appellee should be protected against personal injury from the agents or servants of appellant in charge of the train. The company placed these men in charge of the train. It alone had the power of removal, and justice demands that it should be held responsible for their wrongful acts towards passengers while in charge of the train. Any other rule might place the traveling public at the mercy of any reckless employé a railroad company might see fit to employ, and we are not inclined to establish a precedent which will impair the personal security of a passenger.

We are of opinion that the evidence showed a legal cause of action in plaintiff, and the court did not err in overruling the motion to exclude the evidence from the jury. Two instructions given for the plaintiff have been somewhat criticized, but we think they were in the main correct.

The judgment will be affirmed.

Judgment affirmed.

JOHN B. ZANONE

v.

MOUND CITY.

Filed at Ottawa May 12, 1882—Rehearing denied September Term, 1882.

1. LICENSE—*to keep a dram-shop—arbitrary discrimination as to persons.* Under a general ordinance of a city for licensing dram-shops, the city authorities have no right to make an arbitrary discrimination in granting licenses. They can not grant the same to a favored few and refuse it to another who has in all respects complied with the ordinance and laws of the State, and who is admitted to be in every respect a suitable person.

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63a 459
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97a 3427
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106a 2662
106a 5662

Brief for the Relator.

2. The business of dealing in liquor is recognized by the constitution as a legitimate business, and a license to keep a grocery or dram-shop is placed in the same category with licenses to carry on any other lawful business, and it must be dealt with according to law, and special privileges are not to be granted to particular persons.

3. SAME—*extent of limitation—and in what manner to be prescribed.* The court is not prepared to decide that municipal authorities may not refuse a license to persons of such habits and character as render them unfit persons to be licensed, or that they may not limit the number of dram-shop keepers to be licensed; but this must be done, if at all, by ordinance, and it would seem that in such a case, to avoid favoritism and monopoly, some provision should be made for a fair competition among suitable persons seeking such privileges.

4. SAME—*when the granting will be compelled by mandamus.* Any one who has brought himself strictly within the requirements regulating the licensing power, may compel by *mandamus* the corporate authorities to grant him a license when it is refused through mere caprice.

5. MUNICIPAL CORPORATIONS—*of their powers, and in what manner to be exercised.* Municipal corporations are mere creatures of the legislative will, and can exercise no powers except such as the State has conferred on them. All powers they possess are held by them in trust for the people of the municipality, and for the public generally. Their governmental and administrative powers, other than those conferred by statutory or constitutional enactment, which are self-executing, can only be exercised by appropriate ordinances.

6. ORDINANCES—*of their requisites.* Ordinances must be general in their character, and operate equally upon all persons within the municipality of the same class to whom they relate; they must not be in violation of any law, contrary to public policy, or unnecessarily oppressive, and must not unjustly and arbitrarily discriminate between citizens of the same class.

This is an original application in this court by John B. Zanone, against the authorities of Mound City, to compel them to grant him a license to keep a dram-shop within the city. The respondents demurred to the petition.

Messrs. MULKEY & LEEK, for the relator:

The petition shows everything necessary to entitle the relator to the relief sought, and this is admitted by the demurrer. The power of the city to grant the license is expressly given, and it can not be pretended that the act sought to be enforced is in itself unlawful. The power of the

city to license has been carried into effect by a general ordinance. *People ex rel. Besse* v. *Village of Crotty*, 93 Ill. 180.

The ordinances of such corporations must be reasonable, and such as are vexatious, unequal or oppressive, are void. *City of Chicago* v. *Rumpff*, 45 Ill. 96.

Any suitable person bringing himself within the requirements of an ordinance for licensing a calling, will be entitled to have a license, and it can not arbitrarily be refused to him and granted to others. *City of East St. Louis* v. *Wehrung*, 50 Ill. 32. See, also, *People ex rel. Besse* v. *Village of Crotty*, 93 Ill. 180, and *Prather et al.* v. *People*, 85 id. 36.

Mr. SAMUEL P. WHEELER, for the respondents:

The ordinance of the city provides that no license shall be issued by the clerk until the application for the same shall have been presented to and approved by the city council, and an order made for the issuing of the same. Without this ordinance the relator could not be licensed at all. *People* v. *Village of Crotty*, 93 Ill. 180.

A license is a privilege which may be granted or denied. Had the ordinance been general in its terms, giving to any one the privilege, upon paying a certain sum and giving a bond, making the issuance of the license a mere ministerial act, the case would be different, and a *mandamus* might be awarded, as intimated in *Kadgihn* v. *City of Bloomington*, 58 Ill. 229.

The city council has complete control of this matter. They may refuse any and all licenses, or may grant licenses for the sale of wine and beer only, or in quantities of one gallon and over, or may license on particular streets. This discretion being vested in them, it will not be taken from them by the courts. The exercise of such discretion by the council is final, and not subject to review.

The courts have always held that where the performance of a duty is discretionary, *mandamus* to compel such per-

formance will not lie. The first step towards obtaining a license, is an application to the city council. This is not a mere matter of form, and to be granted of course. It means something more.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

This is an application for a *mandamus* from this court, sought by John B. Zanone, a resident of Mound City, against the municipal authorities of that city, to compel them to issue to him a license to keep a dram-shop within the corporate limits of the city. The case is submitted for final decision upon a demurrer to the petition.

It is charged in the petition, and confessed by the demurrer, that Mound City is organized under the general law of 1872, for the incorporation of cities and villages; that prior to this proceeding the city council passed a general ordinance providing for the issue of licenses to keep dram-shops within the city, upon certain conditions set out in the ordinance; that the petitioner, in strict conformity with all the conditions and requirements of the ordinance, made application for such license, tendering to the city clerk, the proper officer, the license fees fixed by the ordinance, and also a good and sufficient bond, as provided by the 5th section of the Dram-shop act—both of which were refused without any reason being assigned therefor, and that the application for license was denied; that about the time of, and both before and after, his application, the respondents issued licenses to a number of other applicants to keep dram-shops in the same block of the city in which was the location where petitioner proposed, in his application, to keep one. It is also, in the same manner, alleged in the petition and confessed by the demurrer, that the petitioner is *in every respect a suitable person to be licensed* to carry on such business, and that he is the only person whose application for such a license has ever been refused by the municipal authorities. In short, the

record shows a clear and unequivocal case of *arbitrary* discrimination on the part of the defendants against the petitioner. No excuse, justification or explanation is shown or offered by defendants for their action in this regard.

It is claimed by counsel for defendants that the city council, as a matter of law, has the right to exercise this arbitrary discrimination in the matter of granting licenses. No authority has been cited which sustains this position, and we have found none. To so hold would be a departure from some important fundamental principles which underlie municipal government, as framed under our constitution and laws. Municipal corporations are mere creatures of the legislative will, and can exercise no powers except such as the State has conferred upon them. All powers they possess are held by them in trust for the people of the municipality, and for the public generally. Their governmental and administrative powers (other than those conferred by statutory or constitutional enactments, which are self-executing,) can only be exercised by appropriate ordinances. Such ordinances must be general in their character, and operate equally upon all persons within the municipality, of the class to which the ordinance relates. Such ordinances must not be in violation of law, contrary to public policy, or unnecessarily oppressive, and must not unjustly or arbitrarily discriminate between citizens of the same class. These views are not new. On this subject this court has said: "All by-laws should be general in their operation, and should bear equally upon all the inhabitants of the municipality. Where privileges are granted by an ordinance, they should be open to the enjoyment of all upon the same terms and conditions." (*City of Chicago* v. *Rumpff*, 45 Ill. 97.) The business of dealing in liquors is recognized by the constitution as a legitimate business, and license to keep a grocery or dram-shop is placed in the same category with license to carry on the business of a merchant, in cases where a merchant may lawfully be required

to take out a license. So long as the law recognizes the business of keeping a dram-shop as a legitimate business, that business must be dealt with according to law, and special privileges are to be granted to the favored few in that business no more than in any other lawful business, whatever may be the private feelings or views of judges or other public officers. Whether a license be that of a merchant, a peddler, or a keeper of a dram-shop, it confers a privilege upon the citizen for which the law requires a fixed compensation to be paid, and the privilege must be open alike to all citizens of the municipality in and on like conditions.

The case of the *City of East St. Louis* v. *Wehrung*, 46 Ill. 392, recognizes the principle that the licensing power can only be exercised through general ordinances operating uniformly upon all persons in like conditions. The case of *East St. Louis* v. *Wider*, 46 Ill. 351, decides, expressly, that *mandamus* is the proper remedy where an applicant has brought himself within the provisions of such an ordinance, and the municipal authorities refuse the license.

The *Wehrung case, supra*, was an action for a penalty imposed by an ordinance for selling intoxicating liquors without a license. The ordinance was held invalid because it authorized the city treasurer to fix the amount of the license fee to be required of each applicant, and also permitted him, with the concurrence of the mayor, to reject arbitrarily any application he might think proper. It was held that the municipal authorities could not delegate their powers, and also that the discrimination provided for could not be lawfully exercised by the corporate authorities. If an ordinance providing for such arbitrary discrimination be void for that cause, it can not be lawful for the municipal authorities to accomplish the same end by indirection, by conforming to the law in making the ordinance general on its face, and at the same time defeating the requirements of law by the mode of carrying the ordinance into effect.

The doctrine that any one who has brought himself strictly within the requirements regulating the licensing power may compel, by *mandamus*, the corporate authorities to grant him a license where it is refused through mere caprice, is recognized, either expressly or by necessary implication, in all the cases bearing upon this subject to which our attention has been called. In the case of *The People* v. *The Village of Crotty*, 93 Ill. 180, an application for a *mandamus* to compel the village authorities to issue a dram-shop license was denied, under the circumstances of that case, because no bond was tendered, and no ordinance providing for license was shown; but the right to the writ was fully recognized, in cases of this character, where a general ordinance has been passed, and where the applicant has clearly brought himself within the provisions of the ordinance and of the law. Viewed in a legal aspect, in the light of the decisions of this court, no distinction can be perceived in this regard between applications for a merchant's or a peddler's license and applications for license to keep a dram-shop.

Equality before the law is a fundamental principle of our institutions, and no reason is perceived why applicants for license to keep a dram-shop, who are suitable persons to be licensed, should not stand on an equality before the law. Captious discriminations among men of that trade are as obnoxious as would be such discriminations in regard to other trades. Were this an application, under like circumstances, for a license to peddle, or to carry on the business of a merchant, could there be any doubt about the right of the applicant? It is claimed that municipal authorities may exercise a discretion in such matters. We do not decide that they may not refuse license to persons of such habits and character as render them unfit persons to be licensed. In this case the authorities had not decided that the applicant was not a fit man to be licensed. On this record it stands confessed that the applicant is a suitable person to be

licensed. We do not decide that the municipal authorities may not limit the number of dram-shop keepers to be licensed, but this must be done, if at all, by ordinance. And it would seem that in such case, to avoid favoritism and monopoly, some provision should be made for a fair competition among suitable persons seeking such privileges.

Being of opinion that the record shows a clear right in the relator, the peremptory writ sought by the petition is ordered to be issued.

Writ allowed.

Mr. JUSTICE SCOTT: I dissent *in toto* from this opinion.

Mr. JUSTICE WALKER: I do not concur in this judgment.

Mr. JUSTICE SHELDON also dissents.

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ASAHEL GAGE

v.

CHAUNCEY C. STARKWEATHER.

Filed at Ottawa May 12, 1882—Rehearing denied September Term, 1882.

APPEALS AND WRITS OF ERROR—*whether a freehold involved—on bill to redeem land from tax sale.* A bill in chancery to set aside a tax deed upon the ground it is without a seal, and so inoperative as an instrument of conveyance, is, in effect, simply a bill to redeem. A title invalid upon its face does not amount to a cloud. And while a redemption in such case may ultimately affect a freehold, the question of the right to redeem does not involve a freehold. So the case can not be brought from the trial court directly to this court for review, there existing none of the other conditions to give jurisdiction.

WRIT OF ERROR to the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

On the 9th of May, 1879, Chauncey C. Starkweather filed in the office of the clerk of the Superior Court of Cook county

his bill in chancery against Asahel Gage, and therein, in substance, alleged that he was the owner of lot 37, in Rawson's subdivision of lots, in Bradley and Honore's subdivision of the west half of the north-east quarter of section 14, town 39, range 13, and has been such owner since the 15th day of May, 1875; that said lot was sold to Henry H. Gage for $9.90 on the 9th day of April, 1873, for the State and county taxes of 1871; that said lot was sold to the city of Chicago on the 6th day of November, 1874, for $4.87, for the taxes of 1873; that the lawful time of redemption from the first sale did not end until November 7, 1876, and that Asahel Gage, the assignee of Henry H. Gage, applied for and received from the county clerk, on March 15, 1876, a tax deed to said lot, which was duly recorded; that said deed, as appears by the record thereof, is not under seal, and if the same is now under seal said seal has been affixed since the record thereof, without warrant of law; that said lot was taxed in the name of J. G. Dietz, for the taxes of 1872, 1873, 1874 and 1875; that defendant, Gage, filed with the county clerk, as proof of compliance with the law, first, his own affidavit, reciting that he had published in the "Chicago Daily Courier," on December 7, 8 and 9, 1874, a notice that he had bought said premises April 19, 1873, that they were taxed in the name of J. G. Dietz, and that the time of redemption would expire April 19, 1875; second, the affidavit of E. L. Couch, reciting that he was the agent of Asahel Gage, that the lot was vacant September 2, 1873, and was taxed in the name of J. G. Dietz, that he made diligent search for said Dietz, and was unable to find him, and that he is a non-resident; and third, the certificate of sale assigned by said H. H. Gage to said Asahel Gage, said assignment not being under seal; that in 1873, 1874, 1875 and 1876, the said J. G. Dietz, in whose name the lot was taxed, resided in Chicago, and his name and address appeared in the directory for that year; that said deed is a cloud upon complainant's title, and prevents the disposal

of the same. Prayer for summons to said Gage, and that upon a final hearing the said tax deed may be set aside and declared to be void. Complainant offers to pay the taxes and assessments paid by said Gage, with six per cent interest, as a condition of said relief, and prayer for general relief.

The court overruled the demurrer, and the defendant electing to stand by his demurrer, decree was rendered in accordance with the prayer of the bill. Gage prosecutes the present writ of error to reverse that decree.

Mr. AUGUSTUS N. GAGE, for the plaintiff in error.

Messrs. MASON BROTHERS, for the defendant in error.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This writ must be dismissed. No freehold is involved, and there is no other ground upon which we can entertain jurisdiction. The bill, in effect, is simply a bill to redeem. The so-called tax deed is alleged in the bill, and admitted by the demurrer, to have been without a seal, and so it is of no effect as an instrument of conveyance. (*Pile* v. *McBratney*, 15 Ill. 314.) Where title is invalid on its face, so that it can never be successfully maintained, it does not amount to a cloud, but may always be repelled by an action at law. (*Overing* v. *Foote*, 43 N. Y. 290; *Ward* v. *Dewey*, 16 id. 519; *Maloy* v. *Dougherty*, 16 Wis. 269; 2 Story's Equity, sec. 700 a.) Necessarily, therefore, a bill to set aside such an instrument as that here alleged and admitted, could not involve a freehold, and although a redemption may ultimately affect a freehold, the question of the right to redeem very clearly involves no freehold. If the right be established, the decree is simply that the party be allowed to redeem, leaving the title just as it is.

The writ of error is dismissed.

Writ of error dismissed.

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153 427
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67a 77
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169 274
103 562
84a 557
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86a 112
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d187 [3]381
103 562
98a [2]203
103 562
99a [2]620
99a [2]621
103 562
101a [4]234
103 562
d205 [1] 64

LEOPOLD MILLER *et al.*

v.

RUSSELL M. LARNED *et al.*

Filed at Ottawa March 28, 1882—Rehearing denied September Term, 1882.

1. ACCOMMODATION PAPER—*defined.* Accommodation paper is either a negotiable or non-negotiable bill or note made by one who puts his name thereto without consideration, with the intention of lending his credit to the party accommodated. As between the party accommodated and the maker, the note or bill is not collectible.

2. SAME—*what constitutes accommodation paper.* Land actually belonging to A, stood of record in the name of B, who conveyed the same to C, taking back C's two promissory notes to B, for $6000 each, secured by deed of trust upon the land, and B, the payee, indorsed the same in blank, and delivered the same to A, with the understanding of all parties that the notes were to be used by him as he pleased, without any restrictions, the conveyance in fact not being in pursuance of any contract of sale: *Held*, that such notes were to be taken and treated as accommodation paper.

3. SAME—*as to the use of such paper by the beneficiary—and of defences by the maker.* It is a principle of general application that the beneficiary of an accommodation note without restriction as to the mode of its use, may transfer it, either in payment of his indebtedness, or as collateral security for a concurrent or even an antecedent debt, and the maker will have no defence.

4. As to the holder of an accommodation note into whose hands it has come in the usual course of business for a valuable consideration, the maker will have no defence, and it makes no difference that the holder may have taken the note with full knowledge that it was accommodation paper.

5. SAME—*sale of land for accommodation of vendor—rights of third persons.* Although the sale of real estate is colorable and for the accommodation of the vendor or real owner, yet as to third persons who have in good faith acquired an interest in the notes given for the purchase money, or the property itself, the vendee or nominal purchaser will not be permitted to allege his purchase was for the mere accommodation of the vendor, and for that reason not binding on him. As to such third persons all parties to the transaction will be concluded by the record they have made, and it will be treated as an absolute sale.

6. SAME—*release of security for accommodation paper—by whom—and under what circumstances.* Accommodation paper, so long as held by the beneficiary, may be negotiated for his benefit even after maturity; and while such paper is in such condition it is not in the power of the beneficiary to

release the lien of a trust deed securing the same, given by the maker on land of the beneficiary conveyed to the maker for his protection and indemnity, nor can any one else release the same, and the trustee can not, without evidence of the surrender of such paper to the maker or its cancellation otherwise.

7. SAME—*pledge of accommodation paper, and payment of the principal debt—whether a discharge of a mortgage given to secure the paper pledged, as against holders of such paper pledged a second time.* A, the owner of real estate, procured B, in whom the record showed the title, to convey the same to C, for C's two notes, of $6000 each, secured by deed of trust on the premises to D, and C then conveyed the premises to A, who conveyed the same by warranty deed to E for the full value of the land. Before the conveyance to E, B had indorsed the notes in blank to A, who had pledged them as collateral security to a bank for a loan of $10,000; but A's name did not appear upon the notes so pledged, or his interest therein. Afterwards A paid off his debt and took up the notes of C which were pledged, but still left them with the bank, and some time afterwards again pledged them as collateral security for another loan from the bank, and the bank transferred A's note with the collaterals to innocent purchasers for value. E contended that when A paid off his first note of $10,000, and redeemed the pledge of the notes which were secured by the trust deed, that deed was discharged, and the debt secured by it paid: *Held*, that the trust deed was not thereby discharged, and that the notes of C, though accommodation paper, still remained valid obligations in A's hands, and that the second pledge of them was valid.

8. RECORDING ACT—*claimant under trust deed—conveyances subsequent to such deed.* A person buying or taking as collateral security notes secured by trust deed, is under no obligation to search the records before buying or taking the same, to ascertain what conveyances the grantor in the trust deed, or his grantee, has made since the making and recording of the deed of trust. The law charges such purchaser with notice of conveyances in the direct line of the title he is buying, and nothing more.

9. ASSIGNEE—*subject to what defences.* The assignee of a mortgage takes it subject to the same equities that have attached to it in the hands of his assignor. But this rule does not apply to one pledging a note secured by mortgage not payable to him, but held by him under a blank indorsement of the payee, as to which paper he is not a party. Equities against such pledgor will not affect the pledgee or holder of such note.

10. The rule that a mortgagor having the oldest equity may make the same defence against an equitable assignee as he could against the assignor, has no application to an assignee or holder of accommodation paper secured by mortgage. The maker of such paper can not make any defence against one who has taken it in good faith in the usual course of business.

11. SAME—*whether the mortgage should accompany the paper secured.* Where accommodation paper which is secured by a mortgage has been

indorsed and placed in a bank as collateral security for a loan, it is not essential to the protection of the rights of the bank in respect to the security afforded by the mortgage, that the mortgage itself should have passed to the hands of the bank concurrently with the notes secured by it. The assignment of the notes carried with them an equitable assignment of the mortgage, and it did not matter that the assignee did not at the same time obtain possession of the mortgage. That he could obtain at any time when needed.

APPEAL from the Appellate Court for the First District;—heard in that court on writ of error to the Circuit Court of Cook county; the Hon. E. S. WILLIAMS, Judge, presiding.

Messrs. ROSENTHAL & PENCE, for the appellants:

No one is bound to search the records for conveyances made by the same person subsequent to the record of the deed under which he claims. He is only bound to look for prior conveyances or mortgages. *Iglehart* v. *Crane*, 42 Ill. 268; *Matteson* v. *Thomas*, 41 id. 113; *Hosmer* v. *Campbell*, 98 id. 572; *Heaton* v. *Prather*, 84 id. 332; *Connecticut* v. *Bradish*, 14 Mass. 296.

Hansbrough is estopped from alleging that these notes were not for a valuable consideration. *Silverman* v. *Bullock*, 98 Ill. 11; *Commonwealth* v. *City of Pittsburg*, 34 Pa. St. 520.

A contract will be construed according to its legal effect, and not according to a pretended secret agreement different from that expressed on its face. *Mason* v. *Burton*, 54 Ill. 353; *Jones* v. *Allen*, 70 id. 34.

A mortgage being non-negotiable, its assignee takes in equity subject to all the equities residing in the notes secured, in favor of the original maker; but no secret or collateral equity which merely grows out of the note itself, there being no equity between the assignee and a third person, can be asserted against an assignee who takes after maturity. *Olds* v. *Cummings*, 31 Ill. 188; *Ullman* v. *Kline*, 87 id. 268; *Silverman* v. *Bullock*, 98 id. 11; *Colehour* v. *State Savings Inst.* 90 id. 156; *Murry* v. *Lylburn*, 2 Johns. Ch. 441; *Mott* v. *Clark*, 9 Pa. St. 339; *Pryor* v. *Wood*, 31 id. 142; *Davis* v. *Barr*, 9

S. & R. 141; *Livingston* v. *Dean*, 2 Johns. Ch. 479; *Commonwealth* v. *Councils, etc.* 34 Pa. St. 496; *Putnam* v. *Clark*, 29 N. J. Eq. 412; *Losey* v. *Hoagland*, 3 Stockt. 246; *Woodruff* v. *Depue*, 1 McCart, 174; *Starr* v. *Hoskins*, 26 N. J. Eq. 416; 2 Daniell's Neg. Instr. secs. 1435–1437.

The maker of commercial accommodation paper negotiable after maturity to one having notice of its accommodation character, can not defend against the same where no limitation has been imposed upon its negotiation. 1 Daniell's Neg. Instr. sec. 726; Redfield & Bigelow's Leading Cases, 216, 217; Story on Promissory Notes, sec. 194; *Brown* v. *Mott*, 7 Johns. 362; *Grant* v. *Ellicott*, 7 Wend. 227; *Charles* v. *Marsden*, 1 Taunt. 224; *First National Bank* v. *Grant*, 71 Maine, 374; *Smith* v. *Knox*, 3 Esp. 46; *Harrington* v. *Dow*, 3 Rob. 283; *Dunn* v. *Weston*, 71 Maine, 270; *Parr* v. *Jewett*, 81 Eng. C. L. 684; *Maitland* v. *Citizens' National Bank*, 40 Md. 540; *Commonwealth* v. *City of Pittsburg*, 34 Pa. St. 520.

The trust deed was given not only to secure the holder of the notes, but also to indemnify the maker against loss. His personal liability on the notes gives him a right to hold the trust deed as his indemnity. *Burdett* v. *Clay*, 8 B. Mon. 291; *Comstock* v. *Hitt*, 37 Ill. 546; *Fowler* v. *Fay*, 62 id. 377.

The conveyance of the equity of redemption by quitclaim by Hansbrough to Walker, made the land the primary fund as between Hansbrough and Walker for the satisfaction of the notes, and Hansbrough had the right to enforce the security for their payment against the land. *Funk* v. *McReynolds*, 33 Ill. 495; *Tice* v. *Annin*, 2 Johns. Ch. 125; *Matthews* v. *Aiken*, 1 N. Y. 604; *Cox* v. *Wheeler*, 7 Paige, 248; *McKinstry* v. *Curtis*, 10 id. 503; *Dow* v. *Peters*, 3 Edw. Ch. 141; 2 Washburn on Real Property, pp. 216, *575.

Hansbrough being entitled to this security for his indemnity, then the holders of his notes are entitled to be subrogated to his rights, and may enforce his security before

payment by him. *Curtiss* v. *Tyler*, 9 Paige, 432; *Moses* v. *Murtgatroyd*, 1 Johns. Ch. 129; *Phillips* v. *Thompson*, 2 id. 418; *Russell* v. *Clark*, 7 Cranch, 69; *Burdett* v. *Clay*, 8 B. Mon. 291; *Bank* v. *Thorp*, 18 Johns. 505.

Mr. E. C. LARNED, for the appellee R. M. Larned:

Complainants' sole claim to enforce the trust deed is upon an equitable assignment made to them of the same as collateral security to the note of S. J. Walker, of $12,000. By such equitable assignment they take the trust deed subject to all the equities which attached to it in the hands of their assignor, S. J. Walker. If he was estopped from enforcing the mortgage against his grantor, his equitable assignee is equally estopped. *Foster* v. *Strong*, 5 Bradw. 207; *Davis* v. *Beecher*, 69 Ill. 440; *Jones* v. *King*, 25 id. 388; *Walker* v. *Dement*, 42 id. 272; *Gregory* v. *Savage*, 32 Conn. 261; *Brooks* v. *Ricord*, 47 id. 30; *Stafford* v. *Fargo*, 35 id. 454; *Fortier* v. *Darst*, 31 id. 218; *Sumner* v. *Waugh*, 56 id. 539; *Crane* v. *Turner*, 67 id. 439; *Kleeman* v. *Frisbie*, 63 id. 489; *Clute* v. *Robinson*, 20 Johns. 611; *Schaffer* v. *Reilly*, 50 N. Y. 61.

The indebtedness evidenced by the notes being that of S. J. Walker, when he became the owner of the notes the debt, as between him and the maker, was satisfied, and he could not create a new indebtedness against Hansbrough by the reissue of these notes, nor could the mortgage be enforced by him against the premises to the prejudice of his grantee. *Bush* v. *Lathrop*, 22 N. Y. 543; *Turpin* v. *Ogle*, 4 Bradw. 611.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The appeal of Leopold Miller and Jacob Leibenstein brings before this court the decision of the Appellate Court for the First District, in the case of *Augustus Bauer* v. *S. J. Walker*, touching the matters involved in their cross-bill in that case. So much of the decree of the circuit court made in the prin-

cipal case as dismissed the cross-bill of Miller and Leibenstein, by which it was sought to foreclose a trust deed on the tract of land claimed by Russell M. Larned, was affirmed by the Appellate Court, although the decree in other respects was reversed and the cause remanded. As the judgment of the Appellate Court as to Miller and Leibenstein was final and conclusive of their rights, they prayed, and were allowed, an appeal to this court touching the matters adjudged against them.

As elaborate arguments have been made on every phasis of the case as now presented in this court, rather more than the usual elucidation will be required to express the views entertained by the court concerning the question raised and discussed. A concise statement of the facts will be necessary to an understanding of the questions of law discussed. Both parties concede that on and prior to October 24, 1870, the title to the tract of land in controversy was in Henry H. Walker. On that day Henry H. Walker, by warranty deed, conveyed the property to William Hansbrough, and took back a trust deed on the property made to John G. Rogers, to secure two promissory notes, each for the sum of $6000, bearing date the 24th day of October, 1870, and payable to the order of Henry H. Walker, in one and two years, respectively, after date, with interest thereon at the rate of eight per cent per annum. The deed to Hansbrough and the trust deed to Rogers for the security of the notes to Henry H. Walker were both placed on file and recorded in the proper office in Cook county, where the land is situated, on the 5th day of November, 1870. It seems the original trust deed was either lost or destroyed, and afterwards Hansbrough executed a new trust deed describing the same property, and reciting on the face of it that it was made in lieu of the one lost or destroyed. On the 17th day of December, 1870, Hansbrough, by quitclaim deed, conveyed the equity of redemption,—for that was all the interest he then had in

the land,—to Samuel J. Walker; and afterwards, on the 12th day of January, 1871, Samuel J. Walker, his wife joining with him, by warranty deed, for a full, valuable consideration, conveyed the premises to Russell M. Larned: This latter deed was filed for record in the proper office on the 26th day of January, 1871. Leopold Miller and Jacob Leibenstein claim to be the assignees and holders of the Hansbrough notes, and to have the right to foreclose the trust deed and subject the land to their payment, while Russell M. Larned insists he is the owner of the premises under his deed from Samuel J. Walker, divested of the lien created by the trust deed to Rogers,—and this is the real contention between the parties to this appeal.

Had the transaction ended here, the case would have presented no difficulty. Larned, the grantee of Samuel J. Walker, would have taken nothing by his deed from him but the equity of redemption that was in Hansbrough, and the premises in his hands would have been subject to the lien created by the trust deed to Rogers, as the notes to Henry H. Walker secured by the trust deed were outstanding and unpaid. The complications in the case arise out of collateral facts, and the subsequent conduct of Samuel J. Walker, with which Hansbrough and Henry H. Walker had no direct or immediate connection, although it is doubtless true, as the sequel will disclose, that he had their implied, if not express, consent to do as he pleased with the Hansbrough notes. It will, therefore, be necessary to note the connection of Samuel J. Walker with the transaction.

There is evidence tending to show that Samuel J. Walker was the equitable owner of the premises at the time the same were conveyed to Hansbrough, although the legal title was in Henry H. Walker. Be that as it may, it is not a matter of much consequence, as the fact of its existence could not be known to strangers dealing with the land, or the notes secured on it. It appears that soon after the making of the

notes and trust deed by Hansbrough to Henry H. Walker, the latter indorsed the notes in blank, and delivered the same to Samuel J. Walker.

There can be no doubt the transaction between Hansbrough and Henry H. Walker was colorable, and that the conveyance to Hansbrough was not an actual sale. It was a mode adopted to make accommodation paper of such unquestionable value as that it could be readily negotiated by Samuel J. Walker, for whose benefit it was made. Hansbrough incurred no risk in making the paper, for the land on which the notes were secured afforded ample indemnity against his personal undertaking as maker of the notes; and if it is true, as defendant insists it is, that Samuel J. Walker was the equitable owner of the premises, Henry H. Walker was also well secured against personal loss on account of his indorsement of the notes, by the real estate pledged for their ultimate payment. That it was accommodation paper is evident from the testimony of the maker and indorser of the notes. Both admit their personal legal liability thereon, but expected, as the notes were secured on real estate, the party accommodated would take care of them. Neither of them ever expected to pay the notes. It may therefore be assumed, that for the purposes of this decision the notes of Hansbrough in the hands of Samuel J. Walker, were, in the strictest commercial sense, accommodation paper. Such being the case, Samuel J. Walker had the implied consent (which, under the circumstances, was equivalent to express consent,) of both the maker and indorser to negotiate the notes to whomsoever would purchase them, whether due or not. In that regard no limitation was placed on the party for whose use the notes were made as to when or how he should use them. What is called accommodation paper, is, where the maker loans his note to the payee, with a view the latter may negotiate it for his personal benefit. It is not essential such paper should have any consideration to support it. A recognized definition

of accommodation paper is, either a negotiable or non-negotiable bill or note made by one who puts his name thereto without consideration, with the intention of lending his credit to the party accommodated. It is a principle of general application, the beneficiary of an accommodation note, without restriction as to the mode of its use, may transfer it, either in payment of his indebtedness or as collateral security for a concurrent or even an antecedent debt, and the maker will have no defence. The notes in this case are none the less accommodation paper because the maker and indorser are secured against personal liability by a trust deed on real property, alleged to have been equitably owned by the party accommodated. That fact only made the notes that much more valuable in the hands of subsequent holders.

As between the original parties there never was a time when the notes could have been collected off the maker. The reason is, the transaction was for the sole accommodation of Samuel J. Walker, and it was never understood the maker of the notes was obligated to make payment to him or to the payee, Henry H. Walker. But the rule of law is different as to the holder into whose hands the notes may have come in the usual course of business for a valuable consideration. As to him the maker can interpose no defence, and it makes no difference the holder may have taken the notes with the knowledge they were accommodation paper. Accommodation paper is made for the express purpose it may be sold or negotiated for the benefit of the person accommodated, and after it has been sold or negotiated in the usual course of business for value, the maker will not be listened to if he asserts it was without consideration. It is a reasonable rule that one who puts his note or bill in the hands of another to be sold or negotiated, after it is done, will not be permitted to answer the holder, who has taken it in good faith for value, that he does not owe the note or bill. The very purpose of making accommodation paper is, that the party favored may

dispose of it, and unless restricted he may transfer it either before or after maturity, and the maker will be equally bound. The usage in this regard is sanctioned by the practice that has prevailed in mercantile transactions everywhere, in this country and in England. That usage has now the consistence of law. Any other rule would permit the maker of such paper to practice a fraud on persons who should take paper he had put out to be negotiated in the usual course of business. The only safe rule is, that where a bill or note is given, with no restriction as to the mode or time of using it by the party accommodated, and the same has been transferred in good faith in the usual course of business, the holder, if he paid a valuable consideration for it, will be entitled to recover the full amount, although he may have had full knowledge it was accommodation paper. The authorities on this branch of the law are consistent and numerous. A few of them will be cited to illustrate the views expressed: 1 Parsons on Notes and Bills, pages 183, 226; 2 Parsons on Notes and Bills, page 27; *National Bank* v. *Grant*, 71 Maine, 374; *Dunn* v. *Weston*, id. 270; *Brown* v. *Mott*, 7 Johns. 360; *Harrington* v. *Dow*, 3 Rob. 275; *Commonwealth* v. *City of Pittsburg*, 34 Pa. St. 496; *Smith* v. *Knox*, 3 Esp. 46; *Maitland* v. *Bank*, 40 Md. 540.

Whether the notes in this case shall be regarded as accommodation paper in the strict commercial sense in which those terms are used, or whether it shall be held they were given on a fictitious sale of real estate, not intended by either party to be a valid sale, can make but little difference in the ultimate decision of the case. Should they be regarded as coming within the former definition, the principles of the cases cited are applicable; but if the latter shall be adopted, then the principle of *Silverman* v. *Bullock*, 98 Ill. 11, applies with equal force. The principle of the latter case is, that although the sale of real property is colorable, and for the accommodation of the vendor, yet as to third parties who may have acquired in good faith an interest in the notes

given for the purchase money or the property itself, the vendee or nominal purchaser will not be permitted to allege his purchase was for the mere accommodation of the vendor, and for that reason not binding on him. The reason for the rule adopted in that case has its foundation in the plainest principles of natural justice. On the record it appeared to all the world the sale to him was absolute, and as to parties dealing either with the land or the notes secured on it, he was held to be concluded by the record he had himself made. It was therefore held he was personally liable to the assignee of his notes, as was also the estate pledged for their payment. There is much similarity between that case and the one in hand. If the notes are not strictly accommodation paper, then it must be admitted they were given to secure the alleged purchase of a colorable sale of real estate to Hansbrough, which was not intended by any of the parties to the transaction to be a valid sale. On that hypothesis the principle of *Silverman* v. *Bullock* applies, and as to third persons dealing with the notes secured on the property, or with the property itself, all parties to the transaction will be concluded by the record they have made, which shows an absolute sale; and so far as it may be necessary to the protection of persons obtaining in good faith an interest in the notes or land, it must be treated as an absolute sale of the property to Hansbrough.

But the better definition is the one insisted on by defendants,—that is, that the notes of Hansbrough are accommodation paper for the use of Samuel J. Walker, and were so intended to be by both the maker and the indorser. The conveyance to Hansbrough of the land may have been done with a three-fold purpose: First, that the trust deed given on it to Rogers might secure the maker of the notes against personal liability on account of his undertaking; second, that it might afford a like security to the indorser; and third, that it might give additional credit to the notes when the

party accommodated came to negotiate them. In the further consideration of the case the Hansbrough notes will be treated as accommodation paper made for the use of Samuel J. Walker, to be by him negotiated, with no restriction as to the mode or time of using them. As to how or when the accommodated party was to use the notes, neither the maker nor the indorser had any concern, and imposed no restrictions. So far as they were concerned he had unlimited authority to use the notes as he pleased and when he pleased. With this understanding of the character of the paper, and the use the maker and indorser intended should be made of the notes by the party favored, the subsequent conduct of the parties may be more readily comprehended. As previously stated, soon after the making of the notes and trust deed, the notes were indorsed in blank by the payee, Henry H. Walker, and delivered to Samuel J. Walker. On the 28th day of November, 1870, Samuel J. Walker borrowed of the International Bank $10,000, and as collateral security to his own note given for the money borrowed, he pledged the two notes of Hansbrough, with the blank indorsement thereon of Henry H. Walker, by delivering the same to the bank. The name of Samuel J. Walker does not appear on either Hansbrough note, as indorser or otherwise. The principal note was sold by the bank to Amos S. Seely, and the Hansbrough notes were delivered to him in the condition they were received by the bank, as collateral security for the note sold to him. It appears the note held by Seely was afterwards, on the 14th day of June, 1872, paid by the check of Samuel J. Walker, and the collateral notes returned to the bank. On the 2d day of July, 1872, Samuel J. Walker borrowed $12,000 of the same bank, giving his own note, at ninety days, without interest until after maturity, and again pledged the Hansbrough notes as collateral security for his debt. One of the Hansbrough notes had then become due, but it is apprehended that can make no difference, as the

law is well settled the obliged party of accommodation paper, so long as the maker permits him to retain it, may pledge or negotiate it, and the maker has no defence to it against a holder who has taken it in good faith in the usual course of business, for value. Of course, the rule is different as to other paper. As against an assignee of other paper taken after maturity, the maker may defend as successfully as against the original payee. But the rule does not, and it has never been understood to, apply to accommodation paper. The authorities cited *supra* sustain this view of the law.

Treating the Hansbrough notes as strictly accommodation paper, as is warranted by the construction the parties themselves have given to the transaction, the case would seem to present no difficulty. Complainants are the holders of the notes in good faith for a valuable consideration, and would appear to have the clear right to enforce payment, either from the maker, or the indorser, Henry H. Walker, or out of the estate pledged by the trust deed for their payment. Whatever moral obligation may have rested on Samuel J. Walker to make payment of the notes, it does not appear he ever took upon himself any legal obligation to pay them. His name nowhere appears on the notes, as indorser or otherwise. It is to be observed neither Hansbrough, the maker of the notes, nor Henry H. Walker, the payee and indorser, never did and do not now deny their personal liability on the notes. The defence interposed is made solely by Larned, and only by him so far as payment is sought to be enforced against the estate pledged for their payment.

Larned, it will be seen, defends on the ground he took the property, under his deed from Samuel J. Walker, discharged from the lien created by the trust deed. One position taken is, the lien of the trust deed was in fact discharged at the time of the conveyance of the property by Samuel J. Walker to Larned, by the substitution of other collaterals with the bank for Walker's note of $10,000, or by the subsequent

discharge of the debt secured. Of this there is no satisfactory evidence in the record. It is certain the notes were never surrendered to Hansbrough, or to Henry H. Walker, or any one else, to be canceled, nor were they ever in fact canceled. Great stress is laid on the fact the trust deed was not found with the other papers, as showing the collaterals must have been changed at the time of the conveyance to Larned. That fact proves nothing satisfactorily. The assignment of the notes carried with them an equitable assignment of the mortgage by which they were secured, and it is a matter of no consequence whether the trust deed was delivered to the bank at the time. It could be delivered at any time when needed. It was not essential to the protection of the rights of the bank there should have been a concurrent delivery of the mortgage at the time of the delivery of the notes. Nor is it certain the mortgage was not delivered with the notes when they were first hypothecated with the bank.

It may be, and doubtless is, true that Samuel J. Walker agreed, and confidently expected, to procure the Hansbrough notes to be surrendered, and a formal release of the trust deed to be made, when he conveyed the property to Larned, and no doubt the attorneys who acted for Larned as confidently expected and believed he would do so; but the fact remains he did not do it. Past all cavil it is proven the notes remained all the time with the bank, or in the hands of parties holding the notes of Samuel J. Walker, and to whom they were delivered as collateral security for his indebtedness to them. In this connection it is suggested Samuel J. Walker did not intend to pledge the Hansbrough notes as collateral security for the second loan obtained from the bank,—that it was done inadvertently by some officer of the bank. The evidence warrants no such belief. The collaterals are described in the body of the notes over his own signature, and after rights of third parties have attached he will not be permitted to say it was done by mistake. It will

be held he intended to do exactly what he did do, and he will be bound by the legal effect of his act. Nor is there any improbability the bank would accept the notes as sufficient security for the debt of Samuel J. Walker. It is not accurate to say the collateral security was exactly the same amount as the principal debt. These notes had then been bearing interest nearly or quite eighteen months before the loan was effected, and the principal debt would not bear any interest until after the expiration of ninety days. That would make the collaterals considerably in excess of the debt they were to secure. Besides this fact, the opinion of title presented with the notes stated the title to the real estate upon which the notes were secured was perfect in Hansbrough, and that made the collaterals of the highest grade, and abundant security for the principal debt.

The argument the lien of the trust deed was merged in the fee of the estate when Walker paid his note to Seely, and became entitled to the possession of the notes pledged as collaterals, does not seem to have any tenable ground on which to rest. It does not appear that Samuel J. Walker ever had the legal title to the property embraced in the trust deed to Rogers, and it is not perceived how there could be any merger of the equitable title with the fee in him. Nor is it understood how the fact insisted upon could extinguish the indebtedness, or release the lien of the trust deed. The position taken on this branch of the case utterly ignores a fact frequently conceded by defendant, that the Hansbrough notes in the hands of Samuel J. Walker were accommodation paper, and hence he had no rightful authority to discharge the lien of the trust deed while the notes were outstanding and uncanceled, either in his hands or in the hands of any one else other than the maker. Hansbrough himself had an interest in the trust deed that it should be kept alive as indemnity against his personal liability on the notes. Being mere accommodation paper, his notes were

liable to be negotiated at any time, and so long as that contingency existed it was not in the power of Samuel J. Walker or any one else to release the lien of the trust deed. Certainly Samuel J. Walker had no right to do it, nor would the trustee, in whom was the legal title to the property, be authorized to release the lien of the trust deed, until evidence was presented to him the notes had been surrendered to the maker, or had been, in some rightful manner, canceled. It is, therefore, clear there was no release of the trust deed by merger or otherwise, in fact, by a surrender or canceling of the notes.

Another view presented is, that complainants are chargeable with notice of the conveyance by Samuel J. Walker to Larned, which it is said would operate as a release of the trust deed after payment of the Seely note, and he became thereby entitled to the possession of the notes secured. There is no warrant for this position, either in fact or law. Nothing in the evidence authorizes the belief either the bank or Miller and Leibenstein, at the time the notes were pledged a second time, or at any time before, had any actual notice of the deed from Samuel J. Walker to Larned, nor would the law charge them with notice of that fact. Neither of them was under any obligation to search the record before buying the notes, to ascertain what conveyances the grantor in the trust deed or his grantee had since made. The law only charges such purchasers with notice of conveyances in the direct line of the title he is buying, and nothing more,—as, for example, the law charges a dealer in such securities with notice of a release by the mortgagee or trustee, and that is because it is in the direct line of the title he is buying. The decisions of this court that declare this doctrine, are numerous and consistent. A recent case restating the rule is *Hosmer* v. *Campbell*, 98 Ill. 572. But if the law were otherwise, and it had been the duty of the bank, or Miller and Leibenstein, to examine the record of deeds, what would have been discovered? It

is well understood the registry of deeds makes known only such legal or other titles as are recorded. Secret equities existing in others of course are not shown. On examination it would have been discovered Larned had the equity of redemption that was in Hansbrough, and nothing more. It is simply stating that which is self-evident, to say that Samuel J. Walker could convey no greater interest in the land to Larned than he had. By the record,—and certainly no one would insist complainants were bound to discover secret equities,—it appeared he only had the equity of redemption that was in Hansbrough, and that was all he could convey to Larned. The form of the conveyance adopted, whether by quitclaim or warranty deed, could make no difference. A quitclaim deed would have passed the equity of redemption Samuel J. Walker had, as effectually as did the warranty deed employed for that purpose. Charging complainants with notice of all the record disclosed,—if it were allowable, which it is not,—the title to the security pledged for the payment of the notes they were taking was perfect in Rogers, the trustee, and they could purchase with safety. The legal title to the real estate was in him, and it did not appear of record that he had ever released it.

The doctrine is well understood an assignee of a mortgage takes it subject to the same equities that attached to it in the hands of the assignor. It is because a mortgage or a deed of trust is not assignable either at common law or under the statutes of this State. By the common law, choses in action are not assignable so as to vest the absolute title in the assignee, nor has any statute of this State changed the common law in that respect. This has been the rule adopted and acted upon ever since the decision in *Olds* v. *Cummings*, 31 Ill. 188, and has been many times restated in more recent decisions. In the case now before this court the assignment of the notes carried with them an equitable assignment of the trust deed by which they were secured, and under the doc-

trine stated it is insisted complainants, by such equitable assignment, took the trust deed subject to all the equities which attached to it in the hands of Samuel J. Walker; and as he at the time of such equitable assignment to them was equitably estopped from enforcing the trust deed as a mortgage against his grantee, in like manner complainants were estopped to enforce it against Larned. The argument assumes as a fact that which does not appear by this record to exist, —that is, that Samuel J. Walker was the assignor of the notes and trust deed. Such is not the fact. As previously noted, his name nowhere appears, either on the notes or on the trust deed. Henry H. Walker was the assignor, and he is the only person whose name appears on the notes in that capacity. How was Henry H. Walker estopped? There was nothing to operate by way of estoppel as to him that would make it inequitable for him to foreclose the mortgage, had he been compelled to pay the notes on his personal indorsement. But treating the transaction as a valid sale, and under the rule in *Silverman* v. *Bullock*, after the rights of third parties have attached the parties will not be allowed to treat it otherwise than as a valid sale, what defence had Hansbrough to the notes? Certainly none at all, for he had the land by a perfect title, and might have retained it had he removed the incumbrance he placed on it. As was said in the case last cited, a court of chancery will not listen to him when he asserts a transaction fair on the record was secretly colorable for the benefit of his grantor, and, it may be added, nor for the benefit of any other person.

But there is another view that can be taken that is even more forcible and more satisfactory. As between Hansbrough and Henry H. and Samuel J. Walker, it is conceded the notes were mere accommodation paper, although when executed they were secured on real estate. The principle underlying the decision in *Olds* v. *Cummings*, and other analogous cases in this court, is, that the original mortgagor

has equities that are older and superior to any possessed by the assignee of the notes secured, and on the doctrine the oldest equity must prevail, the mortgagor has been let in to make the same defence to the mortgage in the hands of an equitable assignee as he could against the assignor. But what application can this doctrine have to an assignee or holder of accommodation paper? It would be most unreasonable to affirm the grantor in a mortgage to secure accommodation paper, has any equities superior to those of the assignee of the note, who thereby becomes the equitable assignee of the mortgage. Any application of the doctrine of *Olds* v. *Cummings* to the maker of a mortgage to secure accommodation paper, would be to make a most equitable and reasonable doctrine the means of enabling a party to perpetrate a great wrong on another. A court of equity will not lend its aid for any such purpose.

Of course the party accommodated could never recover the amount of the bill or note from the maker, but the settled law is, wherever the common law prevails, to accommodation paper in the hands of one who has taken it in good faith in the usual course of business for value, the maker can make no defence. Were it the law the assignee of accommodation paper was affected by the equities existing between the maker and the party accommodated, such paper, although well secured on real estate, would be utterly worthless in the hands of the assignee who may have taken it in good faith for value in the usual course of business among merchants or other traders. To allow the equities existing between the original parties to accommodation paper secured by mortgage to prevail over the equities of the assignee of the note, would be to carry the doctrine of *Olds* v. *Cummings* to such an unreasonable extent as would ensnare honest dealers in such securities. It is therefore wholly immaterial whether Samuel J. Walker be regarded as the assignor of complainants, as

the mortgage in their hands is not subject to the same defences as it would be in his hands.

There are equitable considerations that strengthen very much the conclusion reached. It is evident if the notes are to be collected, either off the parties personally liable, or by subjecting the mortgaged premises to their payment, or if not collected at all in either mode, some one connected with the transaction must suffer loss. It will fall either upon the present holders, or on Larned, or on Hansbrough, or on Henry H. Walker, as Samuel J. Walker is not now, and never was, personally legally liable to pay the notes. The principal note is worthless on account of the insolvency of the maker, S. J. Walker. The rule of law is, where one of two or more persons must suffer a loss, upon him whose negligent conduct made it possible for loss to occur will the consequences ultimately rest. It is his duty to use reasonable precaution to avoid imposition. That one who stands fair in a transaction should suffer loss for the negligent conduct of another, conflicts with the common understanding of right and justice. *Anderson* v. *Warne*, 71 Ill. 20. In the light of this equitable rule it is proper to ascertain, if possible, on account of whose fault has the complication surrounding this transaction arisen. Whose conduct made it possible for loss to occur? It was not on account of any negligent conduct on the part of complainants. The notes in suit were accommodation paper in the hands of the party accommodated, to be negotiated or hypothecated by him, with the tacit consent of the maker and the indorser, to or with any one willing to receive them. The present holders took them in the usual course of business, as they might rightfully and safely do. It was not for any fault of the indorser, for no negligence can be imputed to him. The same may confidently be affirmed as to the maker of the notes. But how is it as to Larned? It is said he paid full value for the land as for an estate in fee. That is conceded; but did he observe the necessary or even the usual precautions to avoid

ultimate loss? It can hardly be maintained that he did. He knew the notes secured on the land he was buying were negotiable paper not then due, and as they were outstanding the presumption would be, wholly unpaid. The attorneys conducting the negotiations on behalf of defendant were entirely familiar with the title to the land. Shortly anterior they had given an opinion the title to the land was perfect in Hansbrough, and hence the trust deed to Rogers was valid. That opinion was sent with the notes, when they were sent out to be negotiated or hypothecated. Familiar as they certainly were with all these facts, they ought, as a matter of common prudence, to have insisted the notes described in the trust deed should be delivered up to be canceled. Not to do so was the want of ordinary care usually observed in such matters. No matter if the utmost good faith was intended, the grantee had no right to rely on the promise or undertaking of Samuel J. Walker to take up the securities and cancel them. Leaving the notes in the hands of Samuel J. Walker made it possible for him to negotiate or hypothecate them again in the usual course of business, and unless valid, it would be to the great detriment of an innocent taker. The very contingency the negligent conduct of the grantee made it possible to occur, did in fact happen. The notes were hypothecated with complainants, and were taken by them in the usual course of business for value, and without any actual or constructive notice that defendant had any interest in the land pledged for their payment. Had defendant insisted, as was his duty, the notes should be actually surrendered up and canceled before completing his purchase, it would not have been possible for loss to occur. Under the circumstances it is a reasonable conclusion the equities of complainants in the cross-bill in the premises are superior to, and must prevail over, any equities defendant may have.

The judgment of the Appellate Court will be reversed, and the cause remanded to that court, with directions to

reverse the decree of the circuit court dismissing complainants' cross-bill, and to remand the cause for further proceedings conforming to this opinion.

Judgment reversed.

Mr. JUSTICE DICKEY, dissenting:

I can not concur in the conclusion reached in this case. Hansbrough, having title to the land in question, conveyed the same to Rogers, in trust, to secure the payment of his two notes to H. H. Walker, or order, for $6000 each. This placed the naked fee in Rogers, leaving an equity of redemption in Hansbrough, and the equitable interest in the land for security of the notes in H. H. Walker. In equity Rogers had no interest in the land. The whole of the land in equity was in Hansbrough and in H. H. Walker. Thus stood the title of record. The interest, then, in H. H. Walker is the thing in controversy now, between Larned on the one side, and Miller and Leibenstein on the other. No other parties have any interest in the controversy.

The interest of H. H. Walker was in equity transferred by him to Samuel J. Walker, by H. H. Walker indorsing his name upon the notes and delivering the same to Samuel J. Walker. This equitable assignment to S. J. Walker was not recorded. This same equitable interest originally in H. H. Walker was transferred to the bank, by a delivery of the notes from S. J. Walker to the bank, with the blank assignment of H. H. Walker thereon. Thus the ownership in equity of the whole interest in this land was in Hansbrough and in the bank, Hansbrough still holding merely the equity of redemption. In this condition Hansbrough, by quitclaim deed, under date of December 17, 1870, conveyed the land to S. J. Walker, and this deed was recorded January 23, 1871. On January 12, 1871, Samuel J. Walker conveyed, by deed, with full covenants, the land in question to Larned, and this deed was recorded January 26, 1871. At this time the equi-

table interest in this land (given originally to H. H. Walker by the trust deed to Rogers) which is the subject of controversy, was in the bank, held for Seely, who had acquired the Hansbrough notes secured by the trust deed.

The covenants in the deed of Samuel J. Walker to Larned, on record, were in substance a contract by Samuel J. Walker that he would take up and procure the discharge of the notes, or, in other words, that he would purchase the equitable interest in controversy and transfer the same to Larned. All this was of record.

Samuel J. Walker did, June 14, 1872, pay Seely, through the bank, for this equitable interest, now in controversy, and as against all the world except Larned, that interest became the property of Samuel J. Walker. But as between Samuel J. Walker and Larned, the land at once became vested in Larned by operation of the covenants in his deed of record. It seems to me that this was the effect not only as against Walker, but as against all other persons claiming this interest through Walker by subsequent purchase from Walker, with notice, either actual or constructive. After this, and on July 2, 1872, Samuel J. Walker borrowed of the bank some $12,000, and pledged these Hansbrough notes as collateral security for the payment thereof, at ninety days, and gave to the bank as evidence of that debt, and pertaining thereto, a paper in the following words, that is:

"No. 2233. CHICAGO, *July 2, 1872.*

"Ninety days (no grace) after date, for value received, I promise to pay at the office of the International Bank, to the order of the International Bank, the sum of $12,000, with interest at ten per cent per annum after maturity; and in case this note shall not be paid within ten days after the maturity thereof, interest shall thenceforth be charged at the rate of twenty per cent per annum. Such rate was agreed upon as the measure of damages for the non-payment hereof at maturity.

"Having deposited as collateral to secure the payment hereof, two notes, William Hansbrough, $6000 each, and secured by trust deed to John G. Rogers, the east half of the north-west quarter, section 4, town 38 north, range 13 east, which notes I hereby give the legal holder of this note authority to sell, or any part thereof, on the maturity of this note, or at any time thereafter, or before, in the event of said securities depreciating in value in the opinion of said holder, at public or private sale, at his discretion, without advertising the same or giving me any notice, (notice is hereby expressly waived,) and to apply so much of the proceeds thereof to the payment of this note as may be necessary to pay the same, with all interest due thereon, and also the payment of all expenses attending the sale; also five per cent as a brokerage or commission for selling the collaterals; and in case the proceeds of the sale of the said notes shall not cover the principal, interest and expenses, I promise to pay the deficiency forthwith after such sale.

(Signed) SAMUEL J. WALKER."

With the above paper was given to the bank at that time, by S. J. Walker, the Hansbrough notes mentioned in the trust deed to Rogers. These notes, with the memoranda upon them, are set out in the record as exhibits 28 and 29, and are as follows. Exhibit 28 reads as follows:

"$6000. CHICAGO, *October 24, 1870.*

"Two years after date I promise to pay to the order of Henry H. Walker $6000, at the Second National Bank, Chicago, Illinois, value received, with interest from date at eight per cent per annum.

(Signed) WILLIAM HANSBROUGH."

Secured by trust deed of this date, duly stamped. Indorsed on the back of said note, "Henry H. Walker." Written across the face of said note is the following memorandum: "East

half, north-west quarter, section 4, town 38 north, range 13 east third principal meridian."

Exhibit 29 reads as follows:

"$6000. CHICAGO, *October 24, 1870.*

"Two years after date I promise to pay to the order of Henry H. Walker $6000, at the Second National Bank, Chicago, Illinois, for value received, with interest from date at eight per cent per annum.

(Signed) WILLIAM HANSBROUGH."

Secured by trust deed of this date, duly stamped. Indorsed on the back of said note, "Henry H. Walker." On the face of this note was written (as on exhibit 28) the words: "East half, north-west quarter, section 4, town 38 north, range 13 east third principal meridian."

This note of Samuel J. Walker, of July 2, 1872, (being indorsed in blank, thus: "Without recourse. International Bank, Francis A. Hoffman, Cash'r,") was sold and delivered to Miller and Leibenstein, with the collaterals above mentioned. Under this purchase it is that they claim an equitable interest in this tract of land to the extent of paying the amount due on the $12,000 note given to the bank July 2, 1872. Thus it will be seen the only title they claim to an interest in this land is under and through Samuel J. Walker, and this by virtue of an assignment by him of such interest, dated July 2, 1872. If they have any interest in this land it is by purchase from the bank of such interest in the same as the bank derived from Samuel J. Walker by purchase from him on July 2, 1882. Before that time Samuel J. Walker had sold and conveyed *that very interest* (as well as all other interests, to make a full title,) to Larned, by his deed of warranty, and this was on record, and in the direct line of the title bought by them. They had record notice of Larned's rights, and could not undermine them by a subsequent purchase.

Lay aside our recording laws, and Larned's equity is first in time, and therefore superior to that of Miller and Leibenstein. If Larned had neglected to record his deed until after Leibenstein had placed the assignment from Samuel J. Walker on record, by recording the same in the office of the recorder, or by filing a bill in a court of record, setting up their equity, then their equity under the recording laws would be superior. It is a matter of no significance that Samuel J. Walker's name does not appear in the trust deed to Rogers, or on the Hansbrough notes, so long as it appears affirmatively on the face of the assignment of these notes (as collaterals), not written on the notes, that Samuel J. Walker was in possession of the notes, with the blank indorsement of H. H. Walker upon them, and claiming to be the owner, and did assign his supposed interest in the notes, and in this land, by another paper.

I concede that if Miller and Leibenstein had bought these notes of the bank without notice that they were derived from Samuel J. Walker, they would not have been put upon inquiry as to whether he had parted with his interest in this land. He would not then have stood in the line through which they deraign title. I am persuaded that some of my brethren who concur in this decision have not given due consideration to this feature of the case. Miller and Leibenstein have no standing as claimants of an equitable interest in this property, except through and by the purchase from S. J. Walker on July 2, 1870. Before that time Samuel J. Walker had conveyed, for a full price, this very interest to Larned, and his deed was on record.

103 588
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103 588
160 212
161 585
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166 29
103 588
69a 597
103 588
170 616
103 588
73a 502
73a 599
103 588
91a 390
103 588
d207 212

CHICAGO AND NORTHWESTERN RAILWAY COMPANY

v.

ROBERT E. JENKINS.

Filed at Ottawa May 12, 1882—Rehearing denied September Term, 1882.

1. PLEA IN ABATEMENT—*bankruptcy.* A plea of the bankruptcy of the plaintiff and the transfer of his property and rights to an assignee after the commencement of the suit, in abatement of the action, without any prayer of any kind, is subject to demurrer.

2. PARTIES—*assignee in bankruptcy—substitution as plaintiff.* Under section 5047 of the Revised Statutes of the United States, the assignee, at any time after his appointment, has the right to be substituted as plaintiff, on his request, in an action pending in the name of the bankrupt for the recovery of a debt or other thing which might or ought to pass to the assignee, who may thereafter prosecute the suit the same as if originally brought in his name, and such substitution will furnish a good replication to a plea in abatement of the plaintiff's bankruptcy.

3. ACTION—*commencement of suit—what constitutes, as affecting the limitation of actions.* The bringing of a suit is the issuing of a summons or other process to bring the defendant into court. The substitution of the assignee of a bankrupt as plaintiff in a suit, is not to be regarded as the commencement of the suit by the assignee, within the meaning of the United States statute limiting such actions to two years after the assignee's appointment.

4. LIMITATIONS—*as to suits by assignee in bankruptcy—under the act of Congress—to what suits the statute applies.* The statute of the United States limiting the bringing of suits by the assignee of a bankrupt within two years from the time of his appointment, was designed only to apply to suits brought by him, and not to actions already pending in which he may be substituted as plaintiff, although such substitution may be more than two years after his appointment.

5. SAME—*generally—as to cases embraced in the statute.* In construing statutes of limitations, the courts can only hold that they embrace such subjects as are specifically named or embraced in enumerated classes. Cases or classes not enumerated are excluded from their operation by implication.

6. SAME—*does not run during pendency of suit.* The Statute of Limitations does not run against a cause of action after a suit thereon is commenced, and during its pendency, and numerous cases hold that the mere commencement of a suit without service within the statutory period, will prevent the statute from becoming a bar.

Brief for the Appellant.

7. SAME—*effect of making new parties, or introducing new matter, by amendment.* Where not only new parties are made in a pending suit, but by amendment also new rights or causes of action already barred are brought before the court, the Statute of Limitations may be properly set up as to such new matter, but not where no new rights are brought into the suit which were not barred when the suit was brought.

8. LIEN—*how created, and by whom—lien of carrier for demurrage.* All liens are created by law or by contract of the parties, and when the law gives none, neither party can create one without the consent or agreement of the other. Hence the consignee of goods shipped by railroad is not bound by rules and regulations of the railway company providing for a lien for demurrage, though published, without his or the consignor's assent thereto when the contract for shipping the goods was made. Even a knowledge of such rules, without assent thereto, will not affect the shipper or consignee.

9. SAME—*presumption as to assent.* The law will never indulge in the presumption of assent to rules of a railway company for a lien for damages caused by delay in receiving the goods shipped, from the publication of the same.

10. DEMURRAGE—*allowable only on maritime contracts.* The right to demurrage does not attach to carriers by railroads. If it exists at all as a legal right, it is confined to the maritime law, and only exists as to carriers by sea-going vessels, and even then it is believed to exist alone by contract.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. ROLLIN S. WILLIAMSON, Judge, presiding.

Mr. A. M. HERRINGTON, for the appellant:

Under the Bankrupt law the action in favor of the assignee was barred after the lapse of two years. *Gifford* v. *Holmes*, 98 U. S. 252; *Bailey* v. *Glover*, 21 Wall. 346; *Moore* v. *State Ins. Co.* 2 Tenn. Ch. Rep. 380.

If the assignee is not made a party to a pending action until more than two years after his appointment, his claim will be barred, for the amendment by which he is made a party will not relate back, and thereby make him a party *ab initio*, and thereby defeat the limitation. *Cogdell* v. *Exume*, 10 N. B. 327; S. C. 69; N. C. 464.

The rule, without an exception, is, that all causes of action are vested in the assignee upon the execution of the assign-

ment, and the limitation begins to run from that time, and this applies equally to courts of equity and courts of law. *Bailey* v. *Wier*, 21 Wall. 342.

And the limitation applies to the State court as well as to the Federal courts. *Comegg* v. *McCord*, 11 Ala. 932; *Archer* v. *Duvall*, 1 Fla. 219.

This court has held that when a new party is brought into the suit against whom the Statute of Limitations has run, it may be pleaded, and the fact that the suit was pending does not stop the statute. *Clark* v. *Manning*, 95 Ill. 581; *Crowl* v. *Nagle*, 86 Ill. 440.

The bankruptcy of a plaintiff after suit brought may be pleaded, and thereby defeat the action, and the assignee will be compelled to proceed *de novo*. 1 Chitty's Pleading, (16th Am. ed.) 27; *Kinnear* v. *Tarrant*, 15 East, 630; *Biggs et al.* v. *Cox*, 4 Barn. & Cres. 921; *Eyster* v. *Goff et al.* 92 U. S. 524.

Where a party to an action has received his discharge in bankruptcy pending the action, he has no further interest in the suit. *Knox* v. *Exchange Bank*, 12 Wall. 379; *Herranden* v. *Howard*, 9 id. 665.

In trover a lien must be specially pleaded, and can not be given in evidence under the general issue, and hence the pleas were proper, and were not subject to the objection that they amounted to the general issue. 1 Chitty's Pleading, (16th Am. ed.) 530; *Hahn* v. *Ritter*, 12 Ill. 80.

Messrs. SLEEPER & WHITON, for the appellee:

This action was pending in the name of Noyes & Messenger at the time the proceedings were had in bankruptcy, and Jenkins was admitted to prosecute the same in his own name. Revised Statutes of the United States, sec. 5047.

The provisions of sec. 5057, United States Statutes, only limits the maintenance of actions which are commenced by or against an assignee, and do not purport to interfere with

the prosecution of actions pending in the name of the bankrupt at the time when the bankruptcy proceedings are commenced. *Kane* v. *Pilcher*, 7 B. Mon. 651; *Judson* v. *Lathrop*, 6 La. Ann. 587; *Lotting* v. *Fassman*, 17 N. B. 183; *Walker* v. *Towner*, id. 285; *Steele* v. *Moody*, id. 558; *Wilt* v. *Stockton*, 15 id. 23; *Norton* v. *Villebeuve*, 13 id. 304; *Holbrook* v. *Brenner*, 31 Ill. 501; *Stevens* v. *Hauser*, 39 N. Y. 302; *In re Masterton*, 4 N. B. 180; *Sedgwick* v. *Casey*, id. 161; *Dubois* v. *Anderson*, 6 id. 145.

Admitting the assignee to prosecute the suit, was only continuing the same, and was not the commencement of a new suit, and is analogous to continuing a suit by an executor after the plaintiff's death. *Kane* v. *Pilcher*, 7 B. Mon. 651; *Morris et al.* v. *Swartz*, 10 N. B. 305; *Mirus et al.* v. *Swartz*, 37 Texas, 13.

The special pleas were bad on special demurrer, as amounting to the general issue. *Knobel* v. *Kucher*, 33 Ill. 308; *Illinois Central R. R. Co.* v. *Johnson*, 34 id. 389; *Johnston* v. *University*, 35 id. 518; *Kennedy* v. *Strong*, 10 Johns. 289; *Cullett* v. *Flinn*, 5 Cow. 466; *Hunt* v. *Cook*, 19 Wis. 463.

The third plea professes to set up a lien on the paper for demurrage, and seeks to justify the conversion by reason of that lien, but in fact shows none. The rule recited does not pretend to create or impose any lien, and no agreement for any lien is stated. The law does not impose a lien as it does for freight. 2 Redfield on Railroads, title "Demurrage," 191; *Crommellin* v. *New York and Harlem R. R. Co.* 10 Bosw. 77; 4 Keyes, 90.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears that Noyes & Messenger, a business firm in Chicago, had consigned to them a quantity of paper, from Clinton, Iowa, by the road of appellant. It arrived at its depot in Chicago on the 4th of July, 1872. The consignees were afterwards notified of its arrival. On the 11th of that

the necessary and proper party plaintiff, and authorized him to prosecute the suit with like effect as had he been the original plaintiff in the case.

It is insisted that the court erred in sustaining the plea of limitations of the Bankrupt act. The 5057th section of the United States Statutes provides: "No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought *within two years from the time when the cause of action accrued for or against such assignee.* And this provision shall not in any case revive a right of action barred at the time when the assignee is appointed." Appellant contends, that inasmuch as more than two years expired after appellee was appointed assignee, and his substitution as plaintiff, the bar of this section became complete,—that the statute began to run as soon as he was appointed,—that an action accrued to him at that time, and that his substitution was the commencement of the suit by him. If this be the true construction of the statute, then the court erred in sustaining the demurrer to the plea. The fallacy of the argument consists in calling appellee's substitution as plaintiff, the bringing of a suit. The bringing of a suit is the issuing of a summons or other process, to bring the defendant into court. This is one of the most familiar, best settled and recognized rules of the law. See Stephens' Pleading, page 5, (2d ed.); 3 Blackstone's Commentaries, 273; 1 Chitty's Pleading, page 107.

It then follows that this suit was brought by Noyes & Messenger, and not by appellee. Instead, then, of this suit being brought more than two years after appellee's appointment, it was brought before, and was pending at the time, and so continued until his substitution as plaintiff. Had no objection been made by plea by appellant, the suit could have progressed to its final termination in the name of Noyes &

Messenger. This was fully recognized by appellant in filing the plea that they had ceased to have any interest in the cause of action.

In the common acceptation of the term the suit was not brought by appellee by being substituted as plaintiff. All persons would understand it was a misuse, if not a perversion, to so use the term, and we must presume Congress used the term in its ordinary and general sense, unless repelled by the context. A careful consideration of the entire section, we think, does not show that it was intended in a different sense. The 5047th section gave the assignee the right, without limitation or any restriction, to be substituted. Nor is there any limitation or proviso that he shall be thus substituted within two years of his appointment. If such had been the purpose it could have been easily expressed, and the natural inference is that it would have been so expressed. The terms of the statute relate alone to the bringing of the suit within the statutory period, and the courts have no power to add to or bring cases under its provisions not provided for in terms or by necessary implication. In construing statutes courts can only hold that they embrace such subjects as are specifically named or embraced in enumerated classes. To go beyond that is judicial legislation. This case is not named, nor is it embraced in a class. It is excluded by implication from actions brought after appellee's substitution as plaintiff. It clearly is not embraced in that class, and by the previous section he had the right to be substituted without limitation, terms or conditions. We are clearly of opinion, from the language of these two sections, that there was no bar of the action. While statutes of limitation under modern rules must be fairly and reasonably construed to effectuate the intention of the legislature, like other enactments, the courts are prohibited from straining construction to embrace cases not within the language or meaning of the enactment. The

ancient rule was to construe them strictly, so as to exclude all cases not expressly named in the statute, but the rule has been modified by the more modern decisions.

It is, however, urged that other courts have given the section a different construction, and the case of *Binley* v. *Glover*, 21 Wall. 342, is referred to as being in point. If this is true, it is conclusive, as that court has the constitutional right to give authoritative construction to all acts of Congress, and so given, all other tribunals must conform to it. But does it decide this question? That case was where the assignee brought suit, more than three years after his appointment, for the recovery of property rights transferred from the bankrupt to him by the assignment. That was a suit brought by him, and is within the very terms of the statute, and the decision could not be otherwise than the action was barred. The surprise is that it was so far doubted as to have been contested. But this is wholly a different question from that. This is debatable, but that was too clear for dispute. In that case the court say, in considering this section, that "it is precisely like all other statutes of limitation, and applies to all judicial contests between the assignee and other persons touching the property, or rights of property, of the bankrupt, transferable to or vested in the assignee, where the interests are adverse, and have so existed for more than two years from the time the cause of action accrued for or against the assignee. Such is almost the language in which the provision is expressed in the section." This is not in point, because this question was not before the court. But stress is laid on the language, "and applies to all judicial contests between the assignee and other persons." And because this was a contest between appellee and appellant, this language requires the bar to be applied. How does it apply to all judicial contests? Why, as the court, in the same sentence, said, like all other statutes of limitation. This is the manifest and only reasonable meaning of the

language. We must consider it in its connection, and not as a separate and distinct clause, giving a definition.

If like all other statutes of limitation, then who ever heard of the statute running while an action to recover the matter in dispute was pending? Such a claim, we apprehend, was never made in a court. On the other hand, the books are full of cases holding the mere commencement of a suit, without service within the statutory period, will prevent it from becoming a bar. This action, we have seen, was clearly pending, and if, as that court says, this section is precisely like all other statutes of limitation, how is it possible to hold the statute could run and bar the action, when it was all of the time pending? Would any person contend that were the assignee to begin an action just before the close of two years after his appointment, and it were to be undecided for more than two years from its commencement, the defendant might plead this two years statute and bar a recovery? Surely not. And why? Because the suit was not barred when the action was brought, and after it was commenced the statute could not run while the suit was pending. This is the construction given by all courts to all statutes of limitation. There is the same reason for applying the statute to the case at bar.

The statute gives the right to the assignee to be substituted in the place of the bankrupt plaintiff, and to prosecute the suit in his own name, "in like manner, and with like effect, as if it had been originally commenced by him." Was it ever supposed that under any other statute of limitations, where an executor, administrator or other person was substituted in the stead of the plaintiff who brought the suit, the defendant might plead the statute, and bar a recovery? Surely not. And the Federal Supreme Court says this Limitation law is precisely the same in its application as all others. If it be said that in such cases the suit abated by the death of the plaintiff, at common law, and in

such cases the statute authorizes it to be revived and continued in the name of the representative, and its revival was the commencement of a new suit,—if this be true, still the suit was never abated. It was still pending, and the act authorized the assignee to continue its prosecution. Had the suit abated by the bankruptcy of the plaintiffs, there would be more seeming plausibility for saying that the substitution of appellee was the commencement of a new suit by him, and for claiming the plea could have been interposed. But that is not the fact in this case. Nor does the case of *Gifford* v. *Holmes*, 98 U. S. 248, announce a different rule. The other cases referred to in the lower Federal courts, if they announce a different rule, are not binding on us, further than supported by reasoning to convince our judgment. We think that the canons of construction not only support, but require, the conclusion announced by us. In these views we are supported by the case of *Kane* v. *Pilcher*, 7 B. Mon. 651. In that case this precise question was presented, and the court held the statute did not apply. And the case of *Herndon* v. *Howard*, 9 Wall. 664, seems in principle to support this doctrine, if it needs support.

The cases of *Clark* v. *Manning*, 95 Ill. 581, and *Crowl* v. *Nagle*, 86 id. 437, are claimed to have a bearing on this question. These cases have no application, because there were not only new parties made, but rights already barred before they were brought into court for the first time were brought before the court. Here no new rights were brought into the contest. Had appellee amended the declaration so as to embrace a new cause of action not before the court, these cases would then be applicable. But that was not done in this case, but it remained precisely the same, as to the matter in litigation, after as before the substitution of appellee as plaintiff.

It is claimed that appellant had the right to hold the property until its charges for demurrage were paid,—that they

were a lien on the property, and it was not required to make delivery until they were paid. The claim is based on rules and regulations adopted and published by the company. It will be conceded that all liens are created by law, or by contract of the parties. Where the law gives no lien, neither party can create it without the consent or agreement of the other. Noyes & Messenger were therefore not bound by these rules unless they assented to them when the contract for shipping the goods was entered into by the parties, and such a contract is not claimed. But it is insisted that as the rules were public, and generally understood, it must be presumed they assented. For the purpose of creating such a lien on property the law will never indulge such presumptions. There is no evidence or agreement that either the consignor or consignee ever had notice or knew of such regulations. But even if they had, unless they agreed to be bound by them the rule could create no such lien.

We held in the case of *Illinois Central R. R. Co.* v. *Alexander*, 20 Ill. 23, that railroad companies, when they had carried goods to their destination, if not removed by the consignee might store them in their warehouses, and thus terminate their liability as common carriers, and thereby assume the relation and liabilities of warehousemen. To the same effect is the case of *Richards* v. *Michigan Southern and Northern Indiana R. R. Co.* id. 404; and in the case of *Porter* v. *Chicago and Rock Island R. R. Co.* id. 407, it was held it was their duty to do so, or remain liable for loss as common carriers. It was held in the former of these cases, that when stored, and they had placed the goods in their warehouse, they were entitled to charge the customary price for such services, and on such charges being paid or tendered, and a refusal by the company to deliver on demand, it became liable for a conversion.

The right to demurrage, if it exists as a legal right, is confined to the maritime law, and only exists as to carriers

by sea-going vessels. But it is believed to exist alone by force of contract. All such contracts of affreightment contain an agreement for demurrage in case of delay beyond the period allowed by the agreement, or the custom of the port allowed the consignee to receive and remove the goods. But the mode of doing business by the two kinds of carriers is essentially different. Railroad companies have warehouses in which to store freights. Owners of vessels have none. Railroads discharge cargoes carried by them. Carriers by ship do not, but it is done by the consignee. The masters of vessels provide in the contract for demurrage, while railroads do not, and it is seen these essential differences are, under the rules of the maritime law, wholly inapplicable to railroad carriers.

Perceiving no error in the record, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

FRANCIS A. RIDDLE *et al.*

v.

LEVI ROSENFELD *et al.*

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Filed at Ottawa May 12, 1882—Rehearing denied September Term, 1882.

1. USURY—*whether recoverable back when whole debt is voluntarily paid.* Usurious interest once voluntarily paid on a note or contract which has been fully paid and surrendered, can not be recovered back either in a court of law or equity.

2. SAME—*in respect to distinct and separate transactions.* Where five notes were given, each for a distinct and separate loan, procured at different times, and a note secured by deed of trust was deposited with the holder as collateral security for their payment, and all such original notes were paid and taken up except one, which was assigned, together with the collateral, it was *held*, on bill to foreclose the mortgage by the assignee against a subsequent purchaser of the mortgaged premises and others, that usurious interest voluntarily paid on the four original notes so taken up could not be allowed

as a credit upon the remaining unpaid note, as the giving of the collateral did not convert these several notes into one transaction, but each remained a separate cause of action, the same as before.

3. MORTGAGE—*subsequent purchaser—application of payments—duty of holder of mortgage.* The holder of a note secured by deed of trust as collateral security, without actual notice of a subsequent purchase from the mortgagor, is not bound to act with reference to such purchaser's rights in applying payments as a credit.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. M. F. TULEY, Judge, presiding.

Mr. W. T. BURGESS, for the appellants.

Messrs. ROSENTHAL & PENCE, for the appellees.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court:

This was a bill, filed by Rosenfeld and Rosenberg, to foreclose a deed of trust executed by Samuel J. Walker to J. G. Rogers on certain lots in Chicago, to secure a note for $25,000, which was held as collateral security for a note of $7000, bearing date April 23, 1873, due in ninety days, and numbered 2729. Jenkins, assignee of Walker, and Riddle, a subsequent purchaser of the premises, were defendants in the bill. These defendants filed cross-bills to redeem, and for an account. The circuit court found the amount due on the $7000 note, and also on the note held as collateral security, and decreed a sale of the mortgaged premises in payment of the amount found to be due on the principal note. The defendants appealed to the Appellate Court, where the decree was affirmed, and to reverse that decision they have appealed to this court.

It appears from the evidence that appellees held against Samuel J. Walker five notes, which they had purchased from the International Bank of Chicago, which were as follows: No. 2783, for $5000, dated May 15, 1873, at ninety days;

No. 2894, for $7000, dated June 21, 1873, at ninety days; No. 2434, for $15,000, dated November 9, 1872, at fifty-seven days; No. 2729, for $7000, dated April 23, 1873, at ninety days; No. 2961, for $8000, dated June 12, 1873, at ninety days. Walker had pledged with the holders of these notes other securities to be held as collaterals, and the mortgage for $25,000 was taken as additional security for the payment of the five several notes above described. We shall not stop to comment upon the testimony in regard to the payment of these notes, but we are satisfied that the evidence fully establishes the fact that all of the notes had been paid before the filing of the bill, except No. 2729.

It is, however, contended by the defendants that usurious interest was charged and taken on all of the five notes, and although four of them may have been paid by Walker and taken up, still, as this is a proceeding to collect one of the notes, they are entitled to an accounting, and entitled to a credit on the note in suit of all the usurious interest taken on the other notes, with six per cent interest thereon from the time such interest was paid on each of the notes, and that the court erred in directing the master in chancery to state an account only on the $7000 note, rejecting all evidence of usury as to the other four notes. The fact is not denied that more than the legal rate of interest was paid on the four notes which had been taken up, and the same is also true in regard to the note No. 2729, which has not been paid. These five notes were all given for money loaned, and it will be observed that no two of them were given at the same date, nor are they in any manner connected, but each seems to be a transaction by itself—each note was given for a distinct loan of money, made at the time the note was executed. Under such circumstances can the usury, which has been voluntarily paid by Walker on four of the notes which have been paid and taken up, be set up as a defence to the action brought to collect the fifth note?

This question, as we understand it, has been settled by a number of decisions of this court against the position of appellants. In *Hadden* v. *Innes*, 24 Ill. 381, where a similar question arose, it is said: "It is manifest that the legislature had no intention of giving a cause of action to the person who has paid usury, and fails to make the defence when sued for the debt upon which the usury has been paid or agreed to be paid. If he voluntarily pays the principal sum due and the usury agreed to be paid upon it, that is an end of the matter, so far as the statute is concerned. Suppose the party sued upon an usurious note fails to make the defence authorized by statute, but suffers judgment to go against him for the principal and the usurious interest, and pays it, the statute gives him no right to recover back the interest thus paid; and yet he can have no greater right where he pays it voluntarily." In *Carter* v. *Moses*, 39 Ill. 539, the question arose, and it was held the same principle which prevented a recovery of usurious interest voluntarily paid, at law, applied where a remedy was sought in equity. In *Tompkins* v. *Hill*, 28 Ill. 519, the question arose, and it was held that where a party voluntarily pays a note and usurious interest, he can not have an action to recover anything back. Other cases to the same effect might be cited, but the law on the question is so well settled we do not regard it necessary to cite further authorities.

These five notes constituted five separate and distinct contracts, each one of which might have been the subject matter of a separate action to recover the amount due thereon, and whatever usury may have been paid on the four notes which have been paid and taken up, can not be relied upon as a defence to an action brought on the fifth note, for the reason that usurious interest once voluntarily paid upon a note or contract which has been fully paid and surrendered, can never be recovered back either in a court of law or a court of equity. The fact that these five several notes may have been

secured by the collateral note of $25,000, and mortgage, does not, in our judgment, affect the question. That collateral did not transform the five several and distinct notes into one debt or one contract, but each, after the collateral was taken, retained its individual character, the same as before. The collateral was a mere security for the several debts. Nor did the fact that money was collected from collaterals, and applied on the various notes, change their character from separate and individual debts or obligations to one single debt or obligation.

It is also urged, as the deed to Riddle was recorded October 24, 1873, appellees could not, after that time, apply, under the blanket agreement on the Bartlett note, two certain payments indorsed thereon. It does not appear that appellees had actual notice that Riddle had purchased the property, and without such notice they were not bound, under the facts of this case, to act with reference to his rights. The doctrine of *Iglehart* v. *Crane & Wesson*, 42 Ill. 261, we think, applies here.

We perceive no substantial error in the record, and the judgment of the Appellate Court must be affirmed.

Judgment affirmed.

Mr. JUSTICE WALKER: I am unable to concur in the conclusion reached by the majority of the court in this case.

Mr. JUSTICE DICKEY also dissents.

NATHAN B. CRAIG

v.

ISAAC A. MILLER.

Filed at Ottawa May 12, 1882—Rehearing denied September Term, 1882.

1. PAYMENTS—*of their application, in case of several debts.* A debtor by note, and also on an account, has a right, on making a payment, to direct its application to either the note or the account.

2. EVIDENCE—*as to application of payments—indorsement of the payment by the creditor.* Where the maker of a note in a suit thereon testified that in making a payment he directed it to be applied on the note, and the plaintiff that it was made to be applied on an account, it was *held*, error to allow the plaintiff to give in evidence to the jury a copy of the account with his indorsement of the credit thereon, made of his own motion, without the privity of the maker of the note or his surety, and to allow the jury to take such account and indorsement with them on their retirement. The entry of a payment on an account by a creditor instead of on a note of the person paying, is of itself no evidence of any authority to make such application.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Jo Daviess county; the Hon. WILLIAM BROWN, Judge, presiding.

Mr. M. Y. JOHNSON, for the appellant.

Messrs. D. & T. J. SHEEAN, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This was assumpsit, by appellee against appellant, on a promissory note executed by W. R. Craig and appellant to P. M. Spencer, and by Spencer assigned to appellee. The defence was that the note had been paid before suit was brought, by W. R. Craig. That a payment was made to appellee by W. R. Craig, equal to, and, indeed, greater than, the amount of the note, was admitted by appellee; but he

claimed that such payment was made upon an account, while appellant claimed that it was upon the note.

Appellee was permitted by the court, over appellant's objection, to read a copy of the account, with the payment in question thereon indorsed as a credit, in evidence to the jury; and the jury were also permitted, over appellant's objection, to take with them in their retirement to consider of their verdict, the paper on which this copy of account and indorsement of credit thereon were written. This was error. There was no controversy in regard to the account, nor as to the fact that a certain amount of money had been paid by W. R. Craig to appellee, the only controversy being whether W. R. Craig had directed that payment to be applied on the note. He testified, in substance, that he so directed, and appellee testified that he did not. The question was thus one upon which there was evidence both ways, and to be settled in favor of the party best sustained under all the circumstances.

There was no pretense that W. R. Craig or appellant was privy to, or in any way personally bound by, the entry of the credit on appellee's account. It was made by appellee of his own motion, and it was only questioned whether he had authority to make such an application of the payment. If appellee was authorized to apply the payment on the account, that was the end of the controversy, and it was simply impossible that the entry itself could have been any evidence that appellee had authority to make it. Yet, by admitting it in evidence, the court, in effect, told the jury it was evidence, and by permitting them to take the paper in their retirement, they were, in effect, told that this paper, a mere copy of an *ex parte* entry, was a competent instrument in evidence to be considered by them, in a case where the sole issue was whether the party making the original had authority to do so. There is no principle which allows a party to thus bolster and prop up his evidence.

It may be that, in point of fact, the jury were not misled by this evidence. But we can not assert this as a matter of judicial knowledge. If it had any effect (and the more reasonable presumption is that it did have some effect) it was an improper one.

The other objections against the ruling below, discussed in argument, are, in our opinion, untenable. But for this error the judgment below will be reversed, and the cause remanded.

Judgment reversed.

SAMUEL MATHER *et al.*

v.

ASA F. MATHER *et al.*

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Filed at Ottawa May 12, 1882—Rehearing denied September Term, 1882.

1. WILL—*whether void for uncertainty—construction as to who are the ultimate takers—and as to the character of the intervening estate.* A testator provided by his will: "After all my debts are paid and discharged, that the residue of my property, both real and personal, shall remain as my estate as long as I have a living child,—the rents, use and interests of my estate, both personal and real, I dispose of as follows: First, to my wife I will and bequeath one-third of the net income of my estate, both personal and real, during her life, if she accepts it in lieu of dower. Secondly, I will and bequeath to my children the remaining two-thirds of the net income of my estate," naming each child, "during the life of their mother, and after the death of their mother the whole of the net income of my estate during their lives; and should any of my children die before the time for the final division of my estate, leaving heirs of their body, then their children shall take the share of their parent until the final settlement of my estate, and at the death of my last surviving child, my will is that my estate be equally divided between my grandchildren, they to share and share alike. Should any of my grandchildren die before the final division of my property, leaving heirs of their body, their children to take the share of their parent. I hereby appoint my son-in-law, Jonathan Royse, and my son, Asa F. Mather, to be executors of this my last will and testament." It was *held*, the will was sufficiently certain in its provisions to be enforced, and that the purpose of the

testator was, that all his property, both real and personal, should be kept together as one entire estate, the net income of which, in the meantime, was to go, one-third to his wife during her life, and the remaining two-thirds thereof to his children, and upon the death of the wife the entire net income to go to his children until the death of his last surviving child, and on the happening of that event his whole estate to be equally divided among a class of persons described in the will, who might be living at such period of distribution,—the class who were to be the ultimate takers consisting of the grandchildren of the testator, or the children of such of the grandchildren as may have died before the time of distribution, including as well such grandchildren as may have been born after, as those born before, the death of the testator.

2. SAME—*of a devise to a class—who shall take.* The rule is, where a will carves out a particular estate which intervenes the death of the testator and the period of distribution of an estate devised to a class, then all persons belonging to such class, living at the time the estate is to be divided, are included, notwithstanding some of them may have been born after the death of the testator.

3. SAME—*of the sufficiency of the particular intervening estate to support a remainder in fee—devise of the net income of an estate.* It has been held that a devise of rents and profits will pass the land out of which the rents and profits are to arise. So where, as in this case, there is a devise of the net profits of an estate to the wife and children of the testator during their lives, that will operate as a devise of the property to them during their lives. And this particular estate so devised to the wife and children is of such character as will support a remainder in fee devised to another, or to a class of persons. In such case the estate in remainder will not vest in possession at the death of the testator so as to cut off any of those properly belonging to the class designated in the will as ultimate takers.

4. SAME—*as to the management of an estate until distribution—by whom.* In this case, in view of the fact that the net profits of the estate which were to go to the first takers under the will during their lives, must arise out of the personal as well as the real estate, and the direction that the entire estate should be kept together as the estate of the testator until the period for final distribution, and there was no specific direction in the will as to the persons in whose hands the estate should remain, or by whom it should be managed in the meantime, it was held to have been the intention of the testator that this duty should devolve upon the executors named in the will, under their general appointment as executors of his last will and testament.

APPEAL from the Circuit Court of Will county; the Hon. JOSIAH MCROBERTS, Judge, presiding.

Briefs of Counsel.

Mr. A. O. MARSHALL, for the appellants, made the following points among others:

No life or intermediate estate is provided for by the will. There can be but one actual seizin of an estate at one and the same time, and that can only be in him who has a freehold therein. 2 Washburn on Real Prop. 498, sec. 1.

A freehold is necessary to keep the seizin for the remainder-man. 2 Washburn on Real Prop. sec. 8, page 502; 4 Kent's Commentaries, (10th ed.) 268.

It is an essential and imperative rule of law that a remainder should take effect immediately on the determination of the prior estate, the particular estate and remainder together, forming one continuous ownership. 2 Washburn on Real Prop. sec. 10, page 503.

If the particular estate is void, the remainder is left without support. 2 Washburn on Real Prop. sec. 21, page 512; 4 Kent's Commentaries, 269; Broom's Legal Maxims, 180.

A possibility at the creation of the limitation that the event upon which it depends may exceed in point of time the authorized period, is fatal to it. 5 Abbott's (N. Y.) Digest, sec. 12, page 147, and cases there cited.

A limitation void as to some of the persons comprised in the class to which it is made, is void as to the whole class. Courts will not undertake to separate the interests of those who might take from those who can not. *Caldwell* v. *Willis*, 57 Miss. 555; *Smith's Appeal*, 88 Pa. St. 492; Williams on Real Prop. 262; *Davenport* v. *Harris*, 3 Grant, 164; Jarman on Wills, 233.

A devise can not be made to an unborn child of an unborn child. That tends to perpetuity. 1 Washburn on Real Prop. 97.

Mr. ASA F. MATHER, *pro se:*

Courts will, if possible, adopt such construction as will uphold all the provisions of the will. And in carrying this

purpose into effect, it is permissible to resort to any reasonable intendment. Redfield on Wills, chap. 9, sec. 6.

The courts will not, without absolute necessity, hold a devise void for uncertainty, but will give it a meaning if it is possible. 1 Jarman on Wills, 643, and note 1.

The devise is not open to the objection that it creates a perpetuity. The rule is, that a devise may be limited to a life or lives in being, and twenty-one years and a few months over.

The devisees of the fee are a class named by the testator. Who or what persons constitute that class is limited and determined at the expiration of a life in being at the death of the testator. Grandchildren and children of deceased grandchildren of the testator only will answer the description. *Blatchford et al.* v. *Newberry et al.* 99 Ill. 11.

If the will carves out a particular estate which intervenes between the death of the testator and the period of distribution of the estate devised to the class, then all persons belonging to such class at the time when the estate is divided are included, though born after the death of the testator. *Handberry et al.* v. *Doolittle*, 38 Ill. 202.

A testator may make such disposition of his property as he pleases, provided it be not against the statutory rights of his widow, or some law imposing limits to the disposition of property by will. *Heuser* v. *Harris*, 42 Ill. 425; *Broomfield* v. *Broomfield*, 43 id. 147; *Rhoads* v. *Rhoads*, 43 id. 239; *Waldo* v. *Cummings*, 45 id. 421.

The devise is not void for remoteness. The devise is to the testator's own grandchildren. All the children of the testator must be *in esse* at his decease, and their children must be born in their lifetime, so that they necessarily come into existence during a life in being. 1 Jarman on Wills, 542.

As an heir or devisee a child in its mother's womb is regarded as *in esse*. *Botsford* v. *O'Conner et al.* 57 Ill. 72; *McConnell et al.* v. *Smith et al.* 23 id. 611; *Detric* v. *Migatt et al.* 19 id. 146.

The will provides for a valid intermediate estate sufficient to support the remainder. It gives the testator's children a life estate in equal parts, limiting each one's share over in case of death. They would then take *per autre vie.*

It matters not how contingent or uncertain the duration of the estate may be, or how probable is its determination in a limited number of years, if it is capable of enduring for the term of a life it is within the category of estates for life. 1 Washburn on Real Prop. (3d ed.) page 103.

The general intent of the testator must govern, even if a special intent has to yield. Redfield on Wills, 433; 2 Washburn on Real Prop. 540.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This bill was brought by a portion of the heirs of Joshua E. Mather, deceased, against the executor and other heirs, to have the will of the decedent set aside and declared null and void because of the uncertainty of its provisions. Omitting the formal beginning and conclusion, the following is the will as admitted to probate: "After all my debts are paid and discharged, that the residue of my property, both real and personal, shall remain as my estate as long as I have a living child. The rents, use and interests of my estate, both personal and real, I dispose of as follows: First, to my beloved wife, Maria, I will and bequeath one-third of the net income of my estate, both personal and real, during her life, if she accepts it in lieu of dower. Secondly, I will and bequeath to my children the remaining two-thirds of the net income of my estate,"—naming each child,—"during the life of their mother, and after the death of their mother, the whole of the net income of my estate during their lives; and should any of my children die before the time for the final division of my estate, leaving heirs of their body, then their children shall take the share of their parent until the final settlement of my estate, and at the death of my last surviv-

ing child my will is that my estate be equally divided between my grandchildren, they to share and share alike. Should any of my grandchildren die before the final division of my property, leaving heirs of their body, their children to take the share of their parent. I hereby appoint my son-in-law, Jonathan Royse, and my son, Asa F. Mather, to be executors of this my last will and testament."

There can be no doubt as to what the intention of the testator was concerning the disposition of his property. It was, that all of it, both real and personal, should be kept together as one entire estate—the net income of which, in the meantime, was to go to his children—until the death of his last surviving child, and on the happening of that event his whole estate to be equally divided between his grandchildren, they to share and share alike; and should any of his grandchildren die before the final division of his estate, leaving heirs of their body, their children to take the share of their parent. That this was the intention of the testator is so plainly expressed in simple, terse English words, as to admit of no doubt, and his intention ought not to be defeated by any technical rules concerning the construction of wills, if it is possible to prevent it without any palpable violation of what are known as rules of property.

It is certain the grandchildren of the testator living at the time of the death of his last surviving child, or the children of such of his grandchildren as shall die before the happening of that event, are to take the remainder of the estate after the determination of the estate of his own children, whatever that may be. The difficulty in the case lies in ascertaining what estate is devised to the children of the testator. It is said the will is invalid for the reason that, according to its terms, no title to the property left by the testator is to pass to any one so long as he has a living child, as only the net income of his estate is bequeathed to his children during their lives, and hence, it is contended, there is no freehold to

keep the seizin for the remainder-men. This, it is thought, is not a correct reading of the will. The law is, and so this court has distinctly ruled in *Handberry* v. *Doolittle*, 38 Ill. 202, that a devise of rents and profits will pass the land. In support of this doctrine this court cited *Okeden* v. *Okeden*, 1 Atkyns, 552; *Hall* v. *Carter*, 2 id. 358; *Mills* v. *Banks*, 3 P. Wms. 7. So in this case a devise of the net income of his estate to his wife and children, during their lives, is a devise of the property to them during their lives. It is clear this was the intention of the testator, and without the aid of technical terms applicable to such matters, it is hardly possible that intention could have been more certainly expressed. This construction, it will be seen, conforms to the context. The fact the children of any of his children that should die first should take the share of their parent until the period of the final division of the estate should arrive on the death of the last surviving child of the testator, gives additional strength to the construction adopted. That which was done was a devise of his estate to his children during their lives, and on the death of the last surviving child the remainder to go to his grandchildren, or their children, living at the period of distribution. A particular estate would then vest in his children at the death of the testator, and it is such an estate in them as will support the remainder in the grandchild to whom it is devised. That being so, the children of the testator took a particular estate which would prevent the estate devised to the grandchildren from vesting in possession at the death of the testator, and thus it would let in afterborn grandchildren. Adopting this construction, the case is relieved of much difficulty, and effect can be given to the plainly expressed intention of the testator. On this subject the rule of law is, where a will carves out a particular estate which intervenes the death of the testator and the period of distribution of an estate devised to a class, then all persons belonging to such class living at the time the estate is to be

divided, are included, notwithstanding some of them may be born after the death of the testator. Under this doctrine, which has for its support the weight of authority, all grandchildren living at the termination of the life estate of the testator's children, as well those born after as before his death, will be permitted to share in his estate.

There still remains a question to be considered, not free from difficulty. It is as to the management of the estate until the period of final distribution shall arrive. It would seem to be a reasonable construction, and one that would comport best with what appears to have been the manifest desire of the testator, it should remain in the hands of the executors named to execute the will. It will be observed only the "net income" of the estate is to be enjoyed by the children of the testator, and that will arise from personal as well as real estate, for the estate consists of both real and personal property. Unless this is the meaning of the will, it is not perceived how the personal estate could be preserved for the benefit of the several takers under the will. The devise is to a class, viz., to the children of the testator, and an intention is clearly expressed the estate shall be kept together as the estate of the testator until the period of distribution appointed by the will shall arrive. It is obvious this could only be done by the executors retaining the management, and paying to parties entitled thereto the "net income" of the estate, whether derived from the personal or real property.

The decree of the circuit court will be affirmed.

Decree affirmed.

Syllabus.

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57a 528
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103 615
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NOVEL BLAIR

v.

LYMAN B. RAY *et al.*

Filed at Ottawa May 12, 1882—Rehearing denied September Term, 1882.

1. BILL OF EXCEPTIONS—*when necessary—presumption in support of judgment.* If a plaintiff wishes to assign for error the dismissal of his suit on motion, he should present the ground on which the court acted in a bill of exceptions, so that the error, if any, may clearly appear from the record. Where no reasons are assigned for a motion to dismiss a suit, nor any given which led the court to its action, it will be presumed that the dismissal was correct.

2. PRACTICE—*dissolution of injunction as to suit at law—of the proper entry to be made.* Where an entry is made showing that the proceedings in an action at law have been enjoined in equity, and the suit at law continued for that reason, it is proper, before proceeding with the cause, that an entry should be made of record showing the dissolution of the injunction.

3. DISMISSAL *of suit at law—after dissolution of injunction—sufficiency of grounds for dismissal.* An order dismissing an action of replevin and ordering a return of the property, reciting that it appearing to the court that an injunction restraining the further prosecution of the suit has been dissolved, is not sufficient to show the reason for the dismissal. It shows only that the court was authorized to proceed in the cause. The dissolution of the injunction does not of itself furnish ground for a dismissal of the suit enjoined.

4. REPLEVIN—*whether property was replevied—presumption—admission.* Although the sheriff's return to a writ of replevin fails to show a taking of the property under the writ, and its delivery to the plaintiff, it will be presumed in favor of a judgment for a return of the property, in the absence of any contrary showing in the record, that there was evidence justifying the action of the court. And an assignment of error questioning the propriety of the action of the court below in ordering a return of the property replevied, seems to be an implied admission that the property had been in fact replevied.

WRIT OF ERROR to the Appellate Court for the Second District;—heard in that court on writ of error to the Circuit Court of Grundy county; the Hon. JOSIAH MCROBERTS, Judge, presiding.

Brief for the Plaintiff in Error.

Mr. A. W. BULKLEY, for the plaintiff in error:

The Appellate Court based its decision upon the presumption that the circuit court had sufficient evidence to authorize the judgment of dismissal, in the absence of a bill of exceptions. *Blair* v. *Ray et al.* 5 Bradw. 453.

That position is untenable, as no bill of exceptions lies in such a case. It only lies as to matters occurring during the progress of the trial. *Clemson* v. *Krüper*, Beecher's Breese, 210; *Doe* v. *Spraggins*, 1 Scam. 330; *Arentz* v. *Riehle*, id. 340; Rev. Stat. 1874, chap. 110, secs. 60, 62.

If the record shows affirmatively that a motion is sustained for a particular reason, it is sufficient to bring up the cause for review without the aid of a bill of exceptions. *Randolph* v. *Emerick*, 13 Ill. 344.

In this case the record shows, by clear inference at least, that the suit was dismissed because the injunction of the suit had been dissolved. The assigning of one special cause or reason precludes the presumption that there were other reasons.

When the errors are shown by the record of a cause, a bill of exceptions is unnecessary. *Van Dusen* v. *Pomeroy*, 24 Ill. 289; *Gallimore* v. *Duzy et al.* 12 id. 143; *Casey* v. *Harvey*, 14 id. 45.

A defendant who has suffered a judgment by default, can have no bill of exceptions. *Morton* v. *Bailey*, 1 Scam. 213.

The statute only authorizes an order for a return of the property replevied, when the plaintiff fails to prosecute his suit, or suffers a non-suit or discontinuance, or when the right of property is adjudged against him. Rev. Stat. 1874, chap. 119, sec. 22.

The plaintiff did not fail to prosecute, or suffer a non-suit or discontinuance, and there was no adjudication against him, and hence there was error to award a return. Besides, there is no indorsement on the writ that the property ever was replevied. To authorize the order for a return it must

appear the plaintiff has the property. *Prentiss* v. *Moore*, 3 Bradw. 539.

Messrs. HILL & DIBELL, for the defendants in error:

The clerk's entry does not bear the construction that the court dismissed this suit because of the dissolution of the injunction which had restrained its progress. It is not in the province of the clerk to preserve the evidence or recite the facts on which the court acts. These matters can be preserved in the record only by a bill of exceptions. *Herman* v. *Pardridge*, 79 Ill. 477.

It is an error to suppose the plaintiff could not have taken a bill of exceptions. They are required in the following cases not at all mentioned in the statute:

Motions, and affidavits, to dismiss for want or insufficiency of bond for costs, and cross-motions for leave to file bond, and the ruling and exception. *Lucas* v. *Farrington*, 21 Ill. 32; *Douglass* v. *Parker*, 43 id. 146; *Neely* v. *Wright*, 72 id. 292; *Leonard* v. *The People*, 81 id. 308; *Hyatt* v. *Brown*, 82 id. 28. Proof of service of copy of narr. and rule to plead, where such service was required by law, and default had been taken. *Iglehart* v. *Pitcher*, 17 Ill. 308. Notice of motion to supply lost files, and the evidence heard before granting such motion. *McElwee* v. *The People*, 77 Ill. 494. Motions and affidavits to set aside default. *Horn* v. *Neu*, 63 Ill. 539. Motions to strike pleas, affidavits with pleas, affidavits of claim, from the files. *Hay* v. *Hayes*, 56 Ill. 343; *Snell* v. *Trustees*, 58 Ill. 290; *Gaddy* v. *McCleave*, 59 id. 182; *Barger* v. *Hobbs*, 67 id. 596; *Harms* v. *Anfield*, 49 id. 288. Motions, petitions and affidavits for change of venue. (Notice the statute relied on by plaintiff does not provide for such exceptions, save in criminal cases.) *Schlump* v. *Reidersdorf*, 28 Ill. 68; *McElwee* v. *The People*, 77 id. 493. Affidavits on motion to quash a *venire*. *Murphy* v. *The People*, 37 Ill. 455. The ruling and exception thereto on motion to

quash petition and writ of *certiorari*, and to dismiss appeal. *Thompson* v. *White*, 64 Ill. 314. Petition, motion, affidavit and bond to remove cause to United States Circuit Court, and exception to ruling thereon. *Hartford Fire Ins. Co.* v. *Vanduzor*, 49 Ill. 489; *Cromie* v. *Van Nortwick*, 56 id. 353; *Home Ins. Co.* v. *Heck*, 65 id. 112. Motion to retax costs. *Darst* v. *Collier*, 86 Ill. 101. Affidavits on motion to quash execution and set aside judgment. *Roundy* v. *Hunt*, 24 Ill. 598; *Smith* v. *Wilson*, 26 id. 187; *Austin* v. *Lott*, 28 id. 519; *McKindley* v. *Buck*, 43 id. 490.

In the absence of a bill of exceptions showing an error, every intendment will be made to sustain the action or judgment of the court below. *Magill* v. *Brown*, 98 Ill. 235; *Barger* v. *Hobbs*, 67 id. 596; *Gardner* v. *Russell*, 78 id. 292; *Bulger* v. *Hoffman*, 45 id. 352; *Casey* v. *Harvey*, 14 id. 45; *Fanning* v. *Russell*, 81 id. 398; *St. Louis and Southeastern R. R. Co.* v. *Wheelis*, 72 id. 539; *Herman* v. *Pardridge*, 79 id. 472.

The statute authorizes a return of the property if the plaintiff fails to prosecute his suit with effect, which means with success. *Brown* v. *Parker*, 5 Blackf. 292.

In the absence of a bill of exceptions it will be presumed the court properly awarded a return of the property.

Mr. JUSTICE SHELDON delivered the opinion of the Court

This was a suit in replevin, brought by plaintiff in error against defendants in error, to recover certain personal property claimed to belong to plaintiff. The record shows that at the March term, 1876, of the Grundy county circuit court, in which the suit was instituted, the plaintiff filed his declaration, to which defendants filed two pleas; that a demurrer was sustained to them, and that further proceedings in the case were enjoined by injunction from the chancery side of the same court. At the March term, 1877, of the court, the

following order was entered of record, finally disposing of the case:

"Now, on this 23d day of March, A. D. 1877, come the said defendants, by Messrs. Hill & Dibell, their attorneys, and enter herein a motion to dismiss this suit, and for an order of return of the property replevied; and it appearing to the court that the injunction heretofore granted by this court, at the suit of Novel Blair, against the said defendants, on the chancery side of this court, has, on a final hearing of said cause, been dissolved, therefore it is ordered by the court that this suit be and the same hereby is dismissed, and that said defendants do have and recover of and from the said plaintiff the possession of the property replevied herein, and that said plaintiff make return thereof, together with their costs and charges in this behalf expended, and that a writ of *retorno habendo* and *fi. fa.* for such purpose issue out of this court; to which motion said plaintiff, by his attorney, objected, and then and there excepted to the ruling and judgment of the court."

On error, the Appellate Court for the Second District affirmed the judgment, and the plaintiff brings the record to this court, and urges a reversal of the judgment of the Appellate Court.

There is no bill of exceptions in the case. The record does not disclose the reasons which defendants assigned for their motion to dismiss, the proofs they adduced, nor the reasons which led the court to its decision. It does not show, then, the judgment of the circuit court to be erroneous, and it is to be presumed to be correct where it is not shown by the record to be otherwise. Numerous are the cases which have thus held. In *Barger* v. *Hobbs*, 67 Ill. 592, where a plea of former recovery had been stricken from the files by the court below, this court said: "The orders and judgments of the circuit court are presumed to be correct, and it is only when they are clearly shown by the record to be otherwise,

that we are authorized to disturb them. If counsel desired us to pass upon the correctness of this ruling of the circuit court, he should have preserved the plea, and the ruling of the court thereon, in his bill of exceptions. Not having done so, we must presume that the court properly struck the pleas from the files." In *Bulger* v. *Hoffman*, 45 Ill. 352, the suit had been dismissed by the circuit court, and no bill of exceptions filed. The dismissal was assigned for error. This court held, that in the absence of a bill of exceptions "we must presume the appeal was dismissed for non-compliance with some proper rule or order of the court. It is impossible for this court, on what appears, to say why the appeal was dismissed. Appellant should have preserved the point by a bill of exceptions." In *Fanning* v. *Russell*, 81 Ill. 398, the circuit court, on motion, struck meritorious pleas from the files and rendered judgment by default, which was assigned for error. It was there said: "We can not, on this transcript, review the judgment of the circuit court in striking the pleas from the files. We have nothing in the record showing what cause was made to appear before that court. There is no bill of exceptions preserving the evidence heard by the circuit court on that motion. It will not be denied that cases may occur where such an order would be proper. There being no bill of exceptions to show the contrary, this court will presume that a proper case for such an order was made before the circuit court." And see *Casey* v. *Harvey*, 14 Ill. 45. Many more cases to like effect might be cited. These cases sufficiently answer the point made by plaintiff that a bill of exceptions is not authorized to be taken in the case of a motion like the present.

The point is made that the order of dismissal shows the reason for the dismissal of the suit, to-wit, that the injunction against the prosecution of the suit had been dissolved, and that where the order of dismissal itself shows the ground of the action of the court, there is no bill of exceptions neces-

sary, citing *Randolph* v. *Emerick*, 13 Ill. 344, as so deciding. In that case the court said: "The record recites a motion made by the defendant to dismiss the suit because no bond for costs had been filed by the plaintiff. This statement is sufficient to bring up the decision of the circuit court for revision. It affirmatively appears, from an entry on the record, that the court sustained a motion to dismiss, which the defendant had no right to interpose." What was there held was no more than that the clerk's entry was sufficient to show the character of the motion, and it being one of a dilatory nature, was not permissible after the time to plead in abatement had passed, so that it affirmatively appeared from the record that the defendant had no right to interpose the motion, and that it was error in the court to entertain it, the case showing that defendant had demurred to the declaration before making the motion to dismiss. In the present case the record does not show what was the ground of the motion for the dismissal of the suit, and we think there is room for doubt as to what was the ground upon which the court dismissed the suit, and hence it is not clearly shown by the record that there was error.

Does the order of dismissal, as plaintiff's counsel avers, show the ground of the court's decision in dismissing the suit? At the preceding term an entry had been made on the record that it appeared to the court that the cause was enjoined by proceedings in equity, and the case was continued to the next term. At the next term the motion is made to dismiss, and before proceeding to act upon that motion, it would have been very proper that it should have been made to appear to the court that the injunction had been dissolved, and make entry thereof on the record. Accordingly, the order of dismissal recites the entry of the motion, that it appeared to the court the injunction had been dissolved on final hearing, and *therefore* it is ordered that the suit be dismissed. Manifestly the mere removal of the

injunction to proceed in the cause would furnish no reason for the dismissal of the suit—it would but afford justification for proceeding to act upon the motion; and it would seem to be the proper construction of the order that it does not show the whole reason for the dismissal of the suit, but that it shows only a part of the reason of the court's action in the matter of the dismissal of the suit, to-wit, the reason for proceeding to act upon the motion; but that the ground of the court's decision in dismissing the suit rested upon the reasons which defendants assigned for their motion to dismiss, and the matter which was submitted to the court in support of the motion, all which the record fails to show. It is easy to conceive there might have been matter submitted to the court which would have justified the order of dismissal—there might have been a stipulation to dismiss. Plaintiff's objection to the motion does not rebut this.

It is claimed it was error to award a return of the property because there was no return by the officer upon the replevin writ, and therefore nothing to show plaintiff had obtained possession of the property. One assignment of error in the Appellate Court was, that the court below erred in ordering a return of the property *replevied*. This would seem to be an implied admission that plaintiff had got back the property by the writ. If plaintiff had failed to get the property, we must think he would, under the statute, have turned his action into one of trover. But it seems enough to say, that for all this record discloses it may have sufficiently appeared before the court, on the hearing of the motion to dismiss and for an order of return, that the property had in fact been seized by the officer and turned over to the plaintiff, and in support of the order of return this court will so presume.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

Syllabus. Brief for the Appellant.

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STEPHEN GOSSELIN

v.

THE CITY OF CHICAGO.

Filed at Ottawa May 12, 1882—Rehearing denied September Term, 1882.

1. DEDICATION FOR STREETS—*what becomes of the fee.* A statutory dedication vests the legal title to the soil, marked and properly designated for streets, in the city, while a common law dedication leaves the legal title in the original owner.

2. SAME—*insufficient acknowledgment of plat—estoppel—common law dedication.* The owners of land laid out into lots and streets by an agent not authorized to acknowledge the plat thereof, by the sale of the lots will be estopped from questioning the existence of the streets. Such acts will constitute a dedication at common law.

3. TOWN PLAT—*acknowledgment by attorney in fact—its effect.* Under the "Act providing for the recording of town plats," in force February 27, 1833, an attorney in fact was not authorized to acknowledge such plats, and a plat so acknowledged will not vest the legal title of the streets in the corporation.

4. POWER OF ATTORNEY *to sell and convey—extent of authority given thereby.* A power of attorney to sell and convey real estate simply, confers no power to lay off the same into town lots, so as to vest the fee of the streets in the municipality for the use of the public, nor does it authorize the agent to make a partition.

APPEAL from the Superior Court of Cook county; the Hon. SIDNEY SMITH, Judge, presiding.

Mr. HENRY BOOTH, and Mr. F. W. YOUNG, for the appellant:

Under the act of 1833, the plat of land laid out into lots, etc., was required to be acknowledged by the proprietor of the land. It could not be acknowledged by an attorney in fact. Laws 1833, p. 599.

This mode of passing the title, namely,—by making, acknowledging and recording the plat,—is entirely a creation of the statute, and nothing short of a compliance with all the terms of the statute will make it effectual.

Where the corporate authorities of a town claim the fee to the streets and alleys within its limits, it must appear that a plat has been regularly made and recorded. In such case it is the acknowledgment and recording of the plat that vests the fee in the corporation. *Manly* v. *Gibson*, 13 Ill. 312.

The difference between a statutory and a common law dedication is, that the one vests the legal title to the ground set apart for public purposes in the municipal corporation, in trust for the public, while the other leaves the legal title in the original owner. *Chicago, Rock Island and Pacific R. R. Co.* v. *Joliet*, 79 Ill. 32.

The city may acquire the right to the use of the street or road "by dedication or common user, and in such case the fee would remain in the original proprietor, burdened with a public easement." *Indianapolis, Bloomington and Western R. R. Co.* v. *Hartley*, 67 Ill. 442; *Gebhardt* v. *Reeves*, 75 Ill. 304.

There having been no proper acknowledgment, there was no statutory dedication. There was nothing more than an easement, and ejectment does not lie to recover an easement. 3 Blackstone's Commentaries, 206.

Ejectment is not the proper remedy for the disturbance of an easement. Tyler on Ejectment, 41; Adams on Ejectment, 20; Washburn on Easements, 693.

The proper remedy is by injunction, trespass, or case. Gale on Easements, 660; Goddard on Easements, 222.

Mr. FRANCIS ADAMS, for the appellee:

If the acknowledgment of the plat by an attorney was not authorized by law, there is abundant evidence that the principals ratified his act in making and recording the plat, and this removes the objection. *Smith* v. *Town of Flora*, 64 Ill. 93; *Gridley* v. *Hopkins*, 84 id. 528; *Hague* v. *Inhabitants of Hoboken*, 23 N. J. Eq. 354.

The mode prescribed by the statute of 1833 for dedicating land to the public for streets, etc., is a mere mode of con-

veyance. (*Morgan* v. *Railroad Co.* 96 U. S. 716.) And such conveyance may be made by an agent, or if made by one purporting to act as agent, but without prior authority, may be ratified.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This was ejectment by the city of Chicago, against Stephen Gosselin, for a portion of Second street, particularly described in the declaration.

The court instructed the jury, on behalf of the plaintiff, as follows:

"There being no disputed question of fact, it becomes your duty to render the following verdict in this cause: We, the jury, find the defendant guilty, and that the plaintiff has title in fee simple to the premises described in the declaration."

The jury found in accordance with this instruction, and the only question we deem it necessary to consider is, did the proof show a statutory dedication so as to vest the fee of the soil of the street in the city?

A statutory dedication vests the legal title to the soil, marked and properly designated for streets, in the city, while a common law dedication leaves the legal title in the original owner. *Indianapolis, Bloomington and Western R. R. Co.* v. *Hartley*, 67 Ill. 439; *Gebhardt* v. *Reeves*, 75 id. 301; *Chicago, Rock Island and Pacific R. R. Co.* v. *City of Joliet*, 79 id. 25. In the present case, therefore, it may be conceded the proof established a good common law dedication without at all affecting the present question.

The soil originally belonged to Russell, Mather & Roberts, and the contention is, that through their attorney in fact, Gurdon S. Hubbard, they duly acknowledged and recorded a plat, having this street properly designated and marked thereon, on the 22d day of July, 1835, and that they thereby vested the fee of the street in the municipality. The statute

then in force in regard to the acknowledging and recording of such plats, was the "Act providing for the recording of town plats," in force February 27, 1833. (Rev. Stat. 1833, p. 599.) But that act nowhere authorizes attorneys in fact to acknowledge such plats. The provision is, that "county commissioners, or other person or persons," who "wish to lay out a town in this State, or an addition of out-lots, said commissioners, or other person or persons, shall cause the same to be surveyed, and a plat or map thereof made," etc. (Sec. 1.) The "county commissioners, proprietor or proprietors of the town, addition or subdivision of out-lots, by themselves or agent, shall, at the time of surveying and laying out the same, plant and fix at a corner of the public ground, or at the corner of a public lot, * * * a good and sufficient stone," etc. (Sec. 3.) And "the plat or map, after having been completed, shall be certified by the surveyor and the county commissioners; and every person or persons whose duty it may be to comply with the foregoing requisitions, shall, at or before the time of offering such plat or map for record, acknowledge the same before a justice of the Supreme Court, a justice of a circuit court, or a justice of the peace in the county where the land lies. A certificate of such acknowledgment shall be, by the officer taking the same, indorsed on the plat or map, which certificate of the survey and acknowledgment shall also be recorded, and form a part of the record." (Sec. 4.) The only thing here contemplated to be done by an attorney in fact, is the planting and fixing of "a good and sufficient stone" at the corners of the lots, public grounds, etc., and this requirement is imposed as a duty on the county commissioners, or proprietor or proprietors of the town, but allowed to be discharged by them through agents. It is the county commissioners, or other persons wishing to lay out a town, etc., who are to cause the survey to be made, and a plat or map thereof to be made, by the county surveyor, etc. And the persons referred to in section 3 as those

"whose duty it may be to comply with the foregoing requisitions," are plainly only those whose duty it is to cause the survey and plat to be made,—*i. e.*, those wishing to lay out a town, etc.,—the proprietors.

Section 16 of the "Act concerning conveyances of real property," in the Revised Statutes of 1833, (see page 135,) provides, that "all powers, or letters of attorney or agency, authorizing the granting, selling, conveying, assuring, releasing or transferring, or for the executing or acknowledging of any grants, sales, leases, assurances, or other conveyances or writings whatever, concerning any lands and tenements, or whereby the same may be affected in law or equity, shall be acknowledged, or proved, and recorded, as hereinbefore required in cases of deeds and other assurances, after which all grants, conveyances and assurances made and acknowledged pursuant to the powers granted, unless the same be revoked by a deed duly acknowledged or proven, and recorded, as aforesaid, shall be as valid and effectual as if executed and acknowledged by the constituent or constituents." But a town plat is neither a grant, conveyance, nor assurance.

As to the public grounds, streets, etc., it is true its effect is that of a conveyance, but it goes further, and changes the entire character of the property. Surely it could not be pretended that under a specific power to sell and convey a tract of land power would be implied to lay off towns; and if it would require a particular specification in the deed to confer this power, it can need no argument to prove that such an instrument is not here contemplated. A power to sell, simply, does not authorize a partition. *McQueen* v. *Farquhar*, 11 Vesey, 467; Sugden on Powers, (3d Am. ed.) vol. 2, p. 428. The principle would seem to be entirely analogous to that here involved.

That the original owners of the soil are, by their sales, estopped from questioning the existence of the street, is conceded, and so far as affects the public there would seem to

be no ground to question but there has been a good common law dedication of the streets, but we do not think the statutory dedication was ever complete; and so we hold that the court erred in instructing the jury to find that the city has the fee in the street.

The judgment is reversed and the cause remanded.

Judgment reversed.

DICKEY and SHELDON, JJ.: We do not concur in this decision.

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ANN FURLONG, Admx.

v.

MARGARET RILEY *et al.*

Filed at Ottawa May 12, 1882—Rehearing denied September Term, 1882.

1. PRACTICE—*taking advantage of laches by demurrer.* Where the *laches* of a complainant sufficient to bar a recovery appears on the face of the bill, the defendant may raise the question of the sufficiency of the bill as well by demurrer as by answer.

2. Where an administrator's petition for leave to sell real estate to pay debts, filed more than seven years after the grant of letters, attempts to give an excuse for the delay, and thereby to avoid the defence of *laches*, the question of *laches* is properly presented by demurrer, and need not be set up by answer.

3. LIMITATION—*as to administrator's application for sale of land.* A delay of seven years from the grant of letters by an administrator to apply for an order for the sale of land to pay debts, when not sufficiently explained, showing a valid reason for the *laches*, is sufficient to defeat the application.

4. SAME—*sufficiency of reasons for delay.* The fact of the destruction of the records and files of the court by fire, and the neglect, for a number of years, of the administratrix (who was the widow) to have her award fixed by the appraisers, will not furnish sufficient ground to excuse a delay of ten years after the grant of letters in applying for an order to sell real estate of the intestate to satisfy such widow's award. The administratrix can not urge her own neglect of duty as a ground for avoiding the limitation.

5. ADMINISTRATION OF ESTATES—*widow's award—duty of appraisers—remedy in case of delay.* It is the duty of the appraisers of an estate to

Briefs of Counsel.

proceed at once to fix the widow's award, and if they fail to do so, she, having herself become administratrix, may in that capacity, under sec. 75, chap. 3, Revised Statutes, compel them to discharge such duty. It is her duty to see that this is done in a reasonable time, if she desires such award.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Probate Court of Cook county; the Hon. JOSHUA C. KNICKERBOCKER, Judge, presiding.

Messrs. M. A. RORKE & SON, for the appellant:

The practice in proceedings of this character is the same as in chancery. Hurd's Stat. 1881, page 117, sec. 101; *Marshall* v. *Rose*, 86 Ill. 374; *Hobson* v. *Ewan*, 62 id. 146.

The question of *laches* can not be raised by demurrer to the bill or petition, but must be presented by answer. *Clark* v. *Hoyle*, 52 Ill. 427; *Harrison* v. *Cornell*, 80 id. 54; *O'Halloran* v. *Fitzgerald*, 71 id. 53; *School Trustees* v. *Wright*, 12 id. 432; *Thompson* v. *Scott et al.* 1 Bradw. 64.

Appellant's petition fully accounts for the apparent delay in filing her petition, and there is no limitation by statute. *Reed* v. *Colby*, 89 id. 104.

The demurrer admits all the facts well pleaded in the petition. *Stowe* v. *Russell*, 36 Ill. 18; *Harris* v. *Cornell*, 80 id. 54.

The following are the cases in this court where the question of *laches* has been considered: *McCoy* v. *Morrow*, 18 Ill. 519; *Unknown Heirs of Langworthy* v. *Baker*, 23 id. 404; *Rosenthal* v. *Renick et al.* 44 id. 202; *Moore* v. *Ellsworth*, 51 id. 308; *Bunsen* v. *Goodspeed*, 68 id. 277; *Wolf et al.* v. *Ogden*, 66 id. 224.

Messrs. ELLIS & MEEK, for the appellees:

Nothing is better settled in chancery practice than that the Statute of Limitations may be interposed as a defence by demurrer. Story's Equity Pleading, secs. 484, 505, 751, and cases there cited.

Our court has held that the application must be brought within seven years from the grant of letters, unless some reasonable excuse is given for the delay. *McCoy* v. *Morrow*, 18 Ill. 519; *Rosenthal* v. *Renick*, 44 id. 202; *Moore et al.* v. *Ellsworth et al.* 51 id. 308; *Clark et al.* v. *Hoyle et al.* 52 id. 427; *Bishop et al.* v. *O'Conner et al.* 69 id. 431.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court:

This was a petition brought by Ann Furlong, administratrix of the estate of Patrick Furlong, deceased, to obtain a decree to sell the real estate belonging to the deceased at the time of his death. The defendants interposed a demurrer to the petition, and as a ground for demurrer alleged "that the petition shows upon its face that the relief prayed for is barred by the Statute of Limitations, and that the real estate described is not subject to sale to pay said award."

It is first contended by appellant, that the question of *laches* can not be raised by demurrer, but must be presented, if at all, by an answer to the petition. There are cases, no doubt, where the defence of *laches*, to be availing, must be set up in the answer. Such was *School Trustees* v. *Wright*, 12 Ill. 432. But this is not a case of that character. Here the petitioner undertook in the petition to account for the delay, and hence no necessity existed for an answer, all the facts fully showing the delay appearing in the petition, and the demurrer brings before the court the sufficiency of the allegations. If the facts set up by the petitioner afford a legal excuse for not filing the petition at an earlier day, then the demurrer should have been overruled. On the other hand, if the facts alleged do not show sufficient ground for the delay, then the demurrer was properly sustained. The demurrer to the petition presented the question of *laches* as fully and clearly as an answer would have done had one been filed, and hence no necessity existed for putting in an answer. *Hall* v. *Fullerton*, 69 Ill. 448, is in point here. There it

was held that the rule requiring a defendant in a chancery suit to set up and insist on the complainant's *laches* on filing his bill, is for the purpose of enabling the complainant to amend his bill and account for the delay, so as to admit proof to meet the objections, and will not be extended to a case where the bill attempts to account for the delay. Indeed, where the *laches* of a complainant sufficient to bar a recovery appears on the face of a bill, no reason is perceived which would prevent a defendant from raising the question as to the sufficiency of the bill as well by demurrer as by answer, and this is believed to be fully sustained by the authorities. See Story's Equity Pleading, secs. 484, 751, and cases there cited.

It is, however, contended, that if the *laches* of petitioner can be raised by demurrer, she is not barred, and the decision of the probate court holding that she was, is erroneous. We are aware of no statute prescribing a definite period within which an administrator is required, after letters issue, to present a petition for leave to sell real estate; but this court has in a number of cases held, that in analogy to the lien of judgments on real estate and the bar of entries into lands after seven years, that period would be regarded as a reasonable time. *Bishop* v. *O'Conner*, 69 Ill. 431. In *Moore* v. *Ellsworth*, 51 Ill. 308, the court uses the following language: "Each case must be judged upon its own merits, and all that can be said as a general rule is, that a delay of seven years, if unexplained, is a sufficient reason for refusing the order." Under the rule announced in the last case cited, can the petition be sustained?

It appears from the petition that letters of administration issued to appellant, who was the widow, July 20, 1871. A period of almost ten years was allowed to pass before the application to sell land was made. This delay, if unexplained, was a sufficient reason for denying the order of sale. We will examine some of the reasons given for the delay

which are claimed to be sufficient to take the case out of the operation of the general rule. It is said the records of the probate court, and the files relating to this estate, were destroyed by fire, October 9, 1871. We do not, however, regard this as sufficient excuse for the delay. The petitioner could at any time, with but a trifling expense, have restored the lost record and papers, and then gone on and obtained a decree of sale of the land. It is also said that the widow's award, which is the only claim upon which the petition was predicated, was not made and appraised until the 9th day of March, 1881. This was, however, the fault of petitioner. It was the duty of the appraisers to proceed at once to fix the amount of the widow's award, and if they failed to do so, she had it in her power, at any time, under sec. 75, chap. 3, Rev. Stat. 1874, to compel them to discharge their duty. The fact, therefore, that the amount of the widow's award was not determined at an early day, is the fault of the widow, and no one else. She was the administratrix, and the only person interested in the widow's award, and it was her duty to get the appraisers together, and see that they acted within a reasonable time, if she desired the award provided by the statute. This, however, she failed to do, and now undertakes to rely upon her own negligence to arrest the running of the Statute of Limitations. The delay of the administratrix in filing a petition to sell real estate, has not, in our judgment, been satisfactorily explained, and the decree of the probate court that she was barred by her *laches*, was right. The applications for a sale of lands by administrators many years after letters have been issued, are often made on fictitious and unfounded claims, and justice and a proper administration of the law require that they should be scrutinized with a jealous eye. In this case, had the administratrix discharged her duty, this estate would have been settled within two years from the time letters were issued, but for some unexplained reason she does nothing for nine or ten

years, and then undertakes to invoke the aid of the court to sell real estate in satisfaction of a claim due her, known as the widow's award. We know of no more appropriate case to invoke the doctrine of *laches* than this one. It is quite apparent if the widow had regarded her application for a decree as meritorious, she would not have slept on her rights so long.

The decree of the Appellate Court will be affirmed.

Decree affirmed.

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BENJAMIN F. FRIDLEY

v.

EDWIN A. BOWEN *et al.*

Filed at Ottawa January 18, 1883—Rehearing denied September Term, 1883.

1. APPLICATION OF PAYMENTS—*in case of a special security for part of a debt—as to the privilege of the creditor.* A, and a coal and iron company, in which he was largely interested, being indebted to a bank in the sum of $17,000 for advances, A made and delivered his note and mortgage for $10,000, payable to the order of B, in one year, with interest, to secure $10,000 of the debt due the bank, after which A conveyed the premises to C, with covenants of warranty, upon a valid consideration, and from time to time made payments to the bank until over $12,000 of the debts making up the sum of $17,000 were paid, without giving any directions as to what part of the indebtedness the payments should be applied: *Held*, that the payments thus made discharged the note and mortgage.

2. The note and mortgage were pledged as collateral security for the payment of $10,000 of the $17,000 due, and not for the payment of the latter amount. In such a case no privilege is left with the creditor to apply the payments to a part of the debt not covered by the pledge.

3. It is one thing for a man to bind his land to the extent of $10,000 that the whole of a $17,000 debt shall be paid, and quite another thing to bind his land to the extent of $10,000 that ten-seventeenths of the whole debt shall be paid. In both cases the charge upon the land is limited to the sum of $10,000, but in the first case it can only be discharged by payment of the whole of the $17,000, or by payments made to that extent *specifically* on the mortgage note, or specifically to discharge the lien upon the land, while in the latter case the land is discharged by the payment of any part of the $17,000 debt to the extent of ten-seventeenths thereof.

Brief for the Appellant.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

Mr. R. G. MONTONY, for the appellant:

The law is well settled that where the debtor's own negotiable note is taken for a preëxisting debt, it is *prima facie* evidence of payment, and when such note is taken by the creditor for an antecedent debt, it will be presumed to have been taken in satisfaction of it, unless it be shown to have been intended as collateral security. 2 Greenleaf on Evidence, secs. 519, 520; *Cornwall* v. *Gould*, 4 Pick. 444; *Barclay* v. *Gooch*, 2 Esp. 531; *Thatcher* v. *Densmore*, 5 Mass. 299; *Huse* v. *Alexander*, 2 Metc. 157; *Babcock* v. *Hawkins*, 23 Vt. 561; *Ryan* v. *Dunlap et al.* 17 Ill. 40; *Smalley* v. *Edey*, 19 id. 207; *Ralston et al.* v. *Wood*, 15 id. 171; *Wilkinson* v. *Stewart et al.* 30 id. 58; *White* v. *Jones et al.* 38 id. 162; *Walker et al.* v. *Douglas et al.* 70 id. 451; *Yates* v. *Valentine*, 71 id. 644; *Morrison* v. *Smith*, 81 id. 223; *Nevins et al.* v. *Gourley et al.* 95 id. 206; *Castleman* v. *Holmes*, 4 J. J. Marsh. 1; *Dixon* v. *Dixon*, 31 Vt. 450.

From the foregoing authorities the settled rule in this State appears to be:

First—When there is no express agreement showing the intention of the parties, the law will presume, if the negotiable paper is given for the antecedent debt, that it was given in payment thereof, and that the same is satisfied and a new debt created.

Second—Where it is intended merely as collateral or additional security for the debt, there must be an express agreement or acts of the parties sufficient to show that such was the intention.

Third—That whether it is intended as payment or additional security, is a question of fact, to be proved as any other fact, taking into consideration the purposes and objects

for which it is given, the acts of the parties at the time, and all the attendant circumstances.

We contend, however, that it is not necessary to show that the $17,000 has all been paid. Under the terms of the contract, when Taylor paid $10,000 of the $17,000, the mortgage was satisfied.

Mr. FRANK J. CRAWFORD, for the appellees:

Upon the giving of the mortgage the antecedent indebtedness of $17,000 was thereby made to consist substantially of two debts, one of $10,000 secured, and the other of $7000 unsecured. Payments were made, it is true, but no directions were given by the debtor as to their application. The case therefore falls within the rule that when a creditor holds two debts against another, and one is secured and the other is not, and payments have been made by the debtor, and there is no evidence that he directed their application, it will be presumed that they were credited on the debt for which he held no security. *Hare* v. *Stegall*, 60 Ill. 380.

The common law rules governing the application of partial payments, by a person indebted on more than one account, are:

First—The person paying may, at or before the time of payment, prescribe the application of the payment.

Second—If he omit to do so, the creditor may apply it as he pleases.

Third—If neither applies the payment, the application devolves on the court, who will make such application as is reasonable and equitable.

That the general principle is, that the creditor's right of appropriation is indefinite, and may be exercised at any time, is established by a conclusive weight of authority in England and in this country. 1 American Leading Cases, (5th ed.) 345, *281; *Arnold* v. *Johnson*, 1 Scam. 196; *McFarland et al.* v. *Lewis et al.* 2 id. 344; *Bayley* v. *Wynkoop*, 5 Gilm. 449;

Heintz v. *Cahn et al.* 29 Ill. 308; *Lowery* v. *Gear*, 32 id. 382; *Sprague et al.* v. *Hazenwinkle*, 53 id. 419; *Bonnell* v. *Wilder*, 67 id. 327; *Wilhelm* v. *Schmidt et al.* 84 id. 183; *Davis Sewing Machine Co.* v. *Buckles*, 89 id. 243; *Chester* v. *Wheelwright et al.* 15 Conn. 562; Jones on Mortgages, sec. 348; *Johnson's Appeal*, 37 Pa. St. 268.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

The First National Bank of Mendota, on the 25th of March, 1875, had advanced moneys to E. D. Taylor, and to the Illinois Coal and Iron Company, in which Taylor was largely interested, to such amounts that the entire indebtedness to the bank then amounted to the sum of $17,000, and each part thereof was evidenced by paper either made or indorsed by Taylor. Taylor on that day made and delivered to Bowen his own note and mortgage for the sum of $10,000, payable to the order of Bowen, one year after that date, with interest. This note and mortgage were made and delivered to Bowen "to secure $10,000 of this indebtedness to the bank of $17,000," and for no other purpose. Soon after, the mortgage being duly recorded, Taylor, in consideration of equities claimed to exist before the mortgage was made, conveyed the property mentioned in the mortgage to Fridley, with covenants against incumbrances. Taylor, from time to time, after the making of the note and mortgage, made payments to the bank, until over $12,000 of the debts making up the sum of $17,000 were paid. At the time when these payments were made no directions were given by Taylor as to what part of this indebtedness the payments should be applied. This is a bill by Bowen and the bank, brought to foreclose this mortgage, against Taylor, Fridley and others. Fridley alone makes defence. In the Superior Court of Cook county, in which the bill was filed, a decree, on hearing, was made, dismissing the bill as against Fridley. Bowen and the bank appealed to the Appellate Court. There the decree

below was reversed and the cause was remanded, with specific directions to the court below to enter a decree charging the property in question with a lien for the sum of $4711.77, being the amount still unpaid of the $17,000 debt to the bank. From this decree Fridley appeals to this court.

Upon the view taken of this case by a majority of the court, it is necessary to notice but one of the grounds relied upon by appellant. The proof shows that this note and mortgage were pledged to the bank as security for the payment of "$10,000 of the debt of $17,000" due the bank. More than $10,000 of that debt has been paid. That thing for the performance of which this property stood pledged has actually been done. It follows necessarily that the note and mortgage are thereby discharged of the lien of the bank. This note and mortgage were held for the benefit of the bank, by Bowen, as collateral security that ten-seventeenths of the debt of $17,000 should be paid to the bank. The note and mortgage were not pledged as security for the payment of the *whole* of the debt of $17,000. The nature of the contract, arising from the making of this note and mortgage, and their delivery to Bowen, is the vital question. The substance of that contract is the same as if, instead of pledging this note and mortgage, as was done, Taylor had executed to the bank a guaranty that ten-seventeenths of the $17,000 debt should be paid, and to secure that guaranty had executed the mortgage in question.

It is contended that when Taylor made payments the bank had a right to apply the payments to that part of the $17,000 not covered by the security. If the guaranty had covered any specific part of the whole debt, this might have been so; but by the very terms of the arrangement, as stated by the witness Bowen, the pledge had relation to that part of the debt which should be first paid. This being so, there was no privilege left to the creditor to apply the payments to a part of the debt not covered by the pledge. It is one thing for a

man to bind his land to the extent of $10,000 that the whole of a $17,000 debt shall be paid, and quite another thing to bind his land to the extent of $10,000 that ten-seventeenths of the whole debt shall be paid. In both cases the charge upon the land is limited to the sum of $10,000; but in the first case it can only be discharged by general payment of the whole of the $17,000, or by payments made to that extent *specifically* on the mortgage note, or specifically to discharge the lien upon the land, while in the latter case the land is discharged by the payment of *any part* of the $17,000 debt, to the extent of ten-seventeenths thereof.

The case of *Chester* v. *Wheelwright*, 65 Conn. 562, is not in point. The pledge in that case was in substance a charge upon the land to the extent of $3000, as security for the *whole* debt of $10,426. The party who sought to apply payments made generally upon the whole debt in discharge of the land, had bought the land *subject* to this mortgage. By the very terms of his purchase he accepted the burden, and undertook to pay it. Fridley bought the land with covenants against the burden, and did not undertake to pay it. The terms, purpose and mode of the pledge of the land in that case were entirely different from the terms, purpose and mode of the pledge in this case, and the equities between the parties were very different.

The confusion of appellee, in the case at bar, may arise, in a measure, from the fact that the amount of the principal of the note and mortgage given is the same with the amount to be secured by the note and mortgage. Had this note and mortgage been made on its face for $20,000, payable one year from date, with interest, and had these papers in that form been pledged to the bank "to secure $10,000 of the $17,000," or ten-seventeenths of that debt, could there be any doubt that the payment of $10,000, upon any part of the $17,000, would have released the pledge? When released from the pledge, the note and mortgage, whether on their

face calling for $10,000 or $20,000, are of no further force, for it is not claimed that the note evidences any real debt from Taylor to Bowen. In the case of *Chester* v. *Wheelwright*, the note given was to the creditor, and was evidence of real indebtedness to him. It was given in consideration of a larger indebtedness, and to secure the whole of that former indebtedness to that extent, and was not a mere pledge to secure so much of the entire debt. It is true, the mortgage in that case being merely for the amount of the note mentioned therein, the extent to which the land was pledged was limited to that amount, but to that extent it was security for the payment of the whole debt. The question there was, shall the payments made be credited *upon the note mentioned* in the mortgage?—and it was held they should not. Here the contention is, not that these payments must be credited upon the note mentioned in the mortgage, but that such payments, being applied as credits upon any part of the $17,000 debt, have paid more than $10,000 of that debt, and thus they have discharged the note and mortgage from the lien of the bank; and the note and mortgage being so discharged from the bank lien, the same are of no force in the hands of Bowen, for Taylor owed Bowen nothing. The giving of the note and mortgage to Bowen was a mere form by which to put the land in pledge, to assure to the bank that ten-seventeenths of the whole debt should be paid. That having been done, the land is released.

The judgment of the Appellate Court is therefore reversed, and the cause remanded, with directions to affirm the decree of the Superior Court of Cook county.

Judgment reversed.

CRAIG, Ch. J., and WALKER and SHELDON, JJ., dissent.

THE PEOPLE *ex rel.* Seth E. Walker *et al.*

v.

COMMISSIONERS OF HIGHWAYS OF THE TOWN OF OSWEGO.

Filed at Ottawa May 12, 1882—Rehearing denied September Term, 1882.

1. APPEAL—HIGHWAYS—*on appeal from highway commissioners to three supervisors—how far and for what length of time the action of the latter is conclusive.* On an appeal from any order of the commissioners of highways concerning a public road, where the three supervisors obtain jurisdiction, such jurisdiction is exclusive for the time being over the matters embraced in the appeal, and the power of the commissioners over the same subject matter is suspended for the period of one year, and they can not, within that period, make any orders except in furtherance of that of the supervisors.

2. But if the period of one year from the making of the order by the supervisors to establish a road and assess the damages shall have elapsed, without any steps being taken to open the road or pay damages, the commissioners of highways may, if in their judgment the damages are manifestly too high, and their payment an unreasonable burden on the tax-payers of the town, make an order revoking or vacating all the proceedings of the supervisors. It seems the supervisors may do the same thing within the one year succeeding their action.

This is an original petition, filed in this court, for a writ of *mandamus*, to compel the commissioners of highways of the town of Oswego to levy a tax for the payment of the damages assessed for right of way, and proceed to open a road laid out by supervisors on appeal. The facts appear in the opinion.

Mr. BENJ. F. HERRINGTON, for the relators.

Mr. CHARLES WHEATON, for the respondents.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This is an original proceeding in this court, to compel the commissioners of highways of the town of Oswego, by *mandamus*, to proceed, in conformity with the statute, to levy

and certify the requisite tax to pay damages assessed, and to do such other things as may be necessary and proper to open to the use of the public a road that had been laid out by three supervisors of the county, on appeal to them from the action of the commissioners of highways of that town, vacating all previous orders made by them concerning the laying out of the road, and causing the damages that would be sustained to be assessed. A full history of all that was done by the commissioners of highways, and the supervisors on appeal, in and about the laying out of the road, appears in the opinion of this court in *Town of Oswego* v. *Kellogg et al.* 99 Ill. 590. The petition herein states the facts substantially as the same are stated in the opinion of the court there delivered. It will only be necessary, in order to an understanding of the case, to state such facts as have occurred or transpired since the former decision of this court.

At the September term, 1881, on the application of relators, leave was given to file their petition herein, and the summons ordered to be issued was made returnable to the present term of this court. The answer of defendants admits most, if not all, of the facts stated in the petition concerning the laying out and establishing of the road in controversy, but alleges, as a reason why they should not be required to proceed now to levy and certify a tax to pay damages assessed to land owners on the line of the road, or to do other acts necessary to be done to open the road to the use of the public, that soon after the former decision of this court,—that is, on the 14th day of September, 1881,—respondents met, in their capacity as commissioners of highways of the town, and being of opinion the damages assessed on appeal to the supervisors were manifestly too high, and that the payment of the same would be an unreasonable burden on the taxpayers of the town of Oswego, they did, on that day, by a written order duly made, revoke all proceedings theretofore

had on the petition for such road, either by them or the supervisors on appeal, which order was filed in the proper office, and respondents insist that by virtue of such written order all former proceedings concerning the road are made null and of no effect, and for that reason they should not be required to levy and certify the tax prayed for in the petition. Other matters are set forth in the answer why respondents should not be compelled to levy such tax or proceed further to open the road to the use of the public, but in the view taken of the law of the case it will not be necessary to remark upon them.

Section 87, of the act of 1879, in relation to roads and bridges, and which provision has been carried through all the revisions of the statutes concerning roads, certainly since 1872, but sometimes in sections differently numbered, provides that when the commissioners of highways shall be of opinion the damages assessed are manifestly too high, and that the payment of the same would be an unreasonable burden on the tax-payers of the town, they may revoke all proceedings had on the petition in regard to laying out a public road, by a written order to that effect. Such vacation, when made, shall have the effect to annul all such proceedings and assessments. The insistence by relators is, the commissioners of highways can not exercise such powers where the road has been laid out and established by supervisors on appeal, and the damages sustained caused to be assessed by them. The argument is, the action of the supervisors must be final, or otherwise there would be a ceaseless round of contradictory orders by the different sets of officers, concerning the laying out of a public road. It may be the action of the different boards may not always be harmonious under the several sections of the Road law, but the difficulty can not be holpen by judicial construction. The remedy, if any is needed, must be afforded by the legislative department. But a brief analysis of the several sections touching

this subject will show conflicting orders are not so likely to occur as might at first be anticipated, if all the provisions of the statute shall be observed. In section 99, of the same article cited, it is provided that on appeal the supervisors shall have the same power and authority that is by the act conferred on the commissioners of highways, not only in laying out, altering, widening or vacating any road, but shall have the same powers to cause a jury to be called to assess damages; and by section 100 their decision shall be final in regard to laying out, altering, widening or vacating such road, or in refusing to do the same for one year after such decision. It is obvious that after an appeal from the commissioners of highways from any order concerning a public road, and the supervisors have obtained jurisdiction, it is exclusive, for the time being, over the matters embraced in the appeal, and the powers of the commissioners in respect to the same matters must be suspended. This is according to the analogies of the law in all matters of appeal. It is not, therefore, in the power of the commissioners of highways to make any order in relation to such road, conflicting with the order of the supervisors, for the period of one year after the date of their decision, for it is expressly declared their decision shall be final during that period. Of course they may make necessary orders in furtherance of the order of the supervisors, but not otherwise. That would not be in respect to the matters involved in the appeal, nor could it have the effect to annul the action of supervisors during the period their decision shall be final.

It will be observed all powers conferred on the commissioners of highways by law, may be exercised by the supervisors on appeal. Should the damages caused to be assessed by the supervisors be deemed manifestly too high, and the payment an unreasonable burden on the tax-payers of the town, it is plain that within a year after the decision of the supervisors the commissioners have no rightful authority,

under section 87 cited, to revoke the proceedings had on the petition by the supervisors. It is for the obvious reason that by positive statute their decision, so far as the commissioners are concerned, is final during that period. Should they be allowed to do so, the effect would be to annul the action of the appellate board at a time, as has been seen, when it is not allowable. If the proceedings had by the supervisors on appeal in laying out a road and causing damages to be assessed can be revoked at all during the period the statute declares their decision shall be final, it would seem it could only be done by the supervisors making the orders laying out the road and causing the damages to be assessed. On appeal they possess all the powers the commissioners of highways have under the law, and all action by the latter board in conflict with the action of the supervisors is absolutely inhibited for the period of one year. But be this as it may, after the expiration of one year the decision of the supervisors is no longer final, and the commissioners of highways may, in their discretion, make any order in relation to such road that is authorized by law, even if such order is in opposition to the orders made by the supervisors on appeal, and has the effect to annul their decision. Adopting this as the true construction of the statute, the case in hand presents no difficulty, nor any conflict in the action of the different officers authorized by law to act. It was not until after the expiration of the period of one year from the decision of the supervisors that the commissioners of highways assumed by their written order to revoke the proceedings of the supervisors on appeal in respect to laying out the road, and causing the damages that would be sustained to be assessed, because the damages assessed under the authority of the supervisors were manifestly too high, and the payment of the same would be an unreasonable burden on the tax-payers of the town. The period in which the decision of the supervisors was final, had then elapsed, and there was then

no bar to the action of the commissioners of highways. They were as free then to act in the premises as though no appeal from their decision had ever been taken. The road had not been opened, nor had the damages assessed been paid. No obstacle stood in the way of the revocation of the proceedings laying out the road and assessing the damages sustained by land owners on the line of the road, and that was done by the commissioners of highways by a written order to that effect. That the commissioners of highways had jurisdiction to make such order, although the road was laid out by the supervisors on appeal, has been definitely determined by this court in *The People* v. *Commissioners*, 88 Ill. 141, where it is said: "It is manifest that under the 88th section of the act the commissioners had the undisputed power to revoke the order locating the road, and thus annul all proceedings had after the damages were agreed upon by the owner and the three supervisors hearing the appeal." Section 88 of the Road law cited in the opinion of the court, is the same as section 87 cited *supra*. As the order of the commissioners of highways revoking all proceedings on the petition had by the supervisors on appeal in laying out the road and in causing damages to be assessed, on account of the reasons set forth in their written order to that effect, was an order within their jurisdiction to make, and as it stands in full force, it is a sufficient reason why such commissioners should not now be compelled to open such road to the use of the public.

Whether the time consumed in previous litigation is to be estimated, is a matter of no consequence in this case. Had the commissioners of highways been compelled to act *within* a limited period, then it would become material whether the time consumed in litigation—and which would be a restraint on their action—should be estimated. But here the commissioners could not act, and did not assume to act, until *after* the time in which they were prohibited by law from act-

ing had expired, and it is certainly a matter of no consequence what transpired in the meantime.

No case is made on this record that would justify an order to compel the commissioners of highways to open the road in controversy to the use of the public, and the peremptory writ of *mandamus* prayed for will be denied.

Mandamus denied.

DICKEY and SCHOLFIELD, JJ.: We do not concur in this opinion.

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COOK COUNTY
v.
THE CITY OF CHICAGO.

Filed at Ottawa May 12, 1882—Rehearing denied September Term, 1882.

1. TAXATION *of property of counties—assessment of water tax.* The constitutional provision that the property of counties may be exempted from taxation by general law, permits the implication that in the absence of any law exempting the same, such property is liable to taxation. Therefore, in the absence of any law exempting county property, a water tax may be assessed against the same by a city.

2. WATER TAX—*exemption in favor of charitable and educational institutions—construction of an ordinance.* An ordinance of the city of Chicago provides, "that the commissioner of public works be and he is hereby authorized and empowered to remit and rebate the water tax or rates assessed against property used and occupied wholly for charitable and educational purposes:" *Held*, that the ordinance is not imperative that the commissioner shall remit or rebate the rates in any case, but leaves him to the exercise of his discretion in that respect.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

Statement of the case.

This was a bill filed by Cook county against the City of Chicago, to obtain an injunction against the city to restrain it from cutting off the supply of water furnished by it to the Cook county hospital, situated in the city of Chicago. The Superior Court of Cook county, in which the bill was filed, sustained a demurrer thereto, and dismissed the bill. On appeal to the Appellate Court for the First District the decree was affirmed, and the case is brought here on writ of error.

The bill shows that the county of Cook, under its legislative authority to support paupers, has erected within the limits of the city of Chicago a hospital, and pays $72,000 per year for its support, from taxes levied by its board of commissioners; that on September 22, 1879, the city council of Chicago passed the following ordinance: "That the commissioner of public works be and he is hereby authorized and empowered to remit and rebate the water tax or rates assessed against property used and occupied wholly for charitable and educational purposes. Said commissioner may require any or all applications for rebates and for remission of said water tax or rates to be verified by the affidavit of one or more tax-payers." That water rates or assessments were levied by the city of Chicago against Cook county for water furnished to the county hospital, by ordinances passed under the city charter, amounting to the sum of $2383.70, for the period from November 18, 1879, to March 18, 1881, the bill being filed May 15, 1881; that the State Eye and Ear Infirmary and twenty-four private hospitals, including all in Chicago, except the Cook county hospital, are in fact exempted by the city from water taxes under the ordinance aforesaid. The bill sets out ordinances of the city which in a summary way cut off the supply of water for failure to pay water taxes, and a notice by the proper officer of the city that it would cut off the water; that such notice had been given, and that the city, by its officers and agents, threatens to shut off the water of said hospital

for the non-payment of water rates and taxes, which act would cause an irreparable injury to Cook county, and would endanger the lives of the sick who are inmates of the hospital. The bill charges that said water taxes are not due from Cook county to the city of Chicago, because under the facts stated in the bill, and under said ordinance, said hospital and property are exempt from water taxes, because a public charity; that the city of Chicago had power to exempt the property aforesaid from the payment of water rates, and that it did so exempt it by the passage of the said ordinance of September 22, 1879, and that no water rates are due against said property.

Mr. CONSIDER H. WILLETT, for the appellant:

The Cook county hospital is a charitable institution, although patients therein are charged for treatment, it being in no sense an institution for profit to the county. See 14 Allen, 539; 109 Mass. 558.

The power of the city to compromise water rates confers upon it the power to pass this ordinance. *Town of Petersburg* v. *Mappin*, 14 Ill. 194; *Fitzgerald* v. *Harms*, 92 id. 372.

The city can not levy water taxes against county property, *i. e.* tax governmental agencies of the State. Public lands of the United States are not liable to taxation. *Witherspoon* v. *Duncan*, 4 Wall. 210; *How* v. *Dowling*, 18 Cal. 619; *People* v. *United States*, 93 Ill. 30. So of Indian lands. *Tellove* v. *Denniston*, 23 N. Y. 20. Nor are such lands liable to a special assessment. *Fagan* v. *Chicago*, 84 Ill. 233.

In *City of Chicago* v. *The People*, 80 Ill. 384, it was held that the city could not tax school lands though the title was received by the foreclosing a mortgage, and the land was not used for school purposes. Lands of the Illinois Industrial University belong to the State, and are exempt from taxation.

Board of Trustees Illinois Industrial University v. *Champaign County*, 76 Ill. 184.

A city can not levy a special assessment against its own property. *Taylor* v. *People*, 66 Ill. 322.

The ordinance exempts property used as a charity from water taxes, and this hospital being a public charity, is clearly within the exemption.

Mr. FRANCIS ADAMS, for the appellee:

The ordinance does not purport to exempt any property from water rates, but merely to authorize the rebate in the cases specified. Even though the council had the power to exempt property from water assessments, it could not delegate that power to a mere executive officer. Such power can not be delegated. *City of East St. Louis* v. *Wehrung*, 50 Ill. 28; *Kinmundy* v. *Mahan et al.* 72 id. 462.

The ordinance is not imperative that the commissioner shall remit or rebate the rates in any case. This is left to his judgment and discretion, and the exercise of a discretionary power can not be compelled by *mandamus*. Dillon on Mun. Corp. (3d ed.) sec. 832; *Walton* v. *Develling et al.* 61 Ill. 201; *People* v. *Board of Supervisors*, 84 id. 303; *County of St. Clair* v. *People*, 85 id. 396.

It appears from the bill that the county hospital is not a wholly charitable institution. Appellant, therefore, is not entitled to a rebate, not being within the terms of the ordinance, which must be strictly construed. *Methodist Episcopal Church* v. *City of Chicago*, 26 Ill. 482; *Northwestern University* v. *The People*, 80 id. 335.

The ordinance is *ultra vires* and void. The rates, when levied, become a debt due the city, and the city is prohibited from releasing debts. Municipal Incorporation law, sec. 172.

The city can not rebate taxes legally levied. *Sherlock* v. *Village of Winnetka*, 68 Ill. 534.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

We do not perceive, as the bill avers, that the ordinance of September 22, 1879, does exempt the county hospital from the payment of water taxes. It does not profess to exempt any property from water rates or assessments, but merely to authorize the rebate, in the cases specified, of water rates already levied. The ordinance is not imperative that the commissioner shall remit or rebate the rates in any case, but he is only authorized and empowered to do so. It seems to us that the ordinance merely purports to authorize the commissioner to remit or rebate such water rates, leaving the exercise of the power to his judgment and discretion. The city council seems to construe the ordinance differently from appellant, by refusing its application for a rebate. The bill sets forth that on "September 20, 1880, an order was presented in the city council of Chicago that the county hospital be furnished with water free of charge, which order was at said date referred by said council to the committee on fire and water, which committee, November 8, 1880, reported back said order of said council, with the recommendation that it should not pass, which report was concurred in. December 27, 1880, a resolution was presented in said council by one of its members to furnish water free to said hospital, which resolution was referred to the committee on fire and water, who have made no report, and the council has taken no action." This action of the city council shows its own understanding to be, that said ordinance of September 22, 1879, did not in itself exempt the county hospital from the payment of the water tax.

It is urged that the city has no power to levy water taxes against county property,—to tax governmental agencies of the State. The constitution provides that the property of counties may be exempted from taxation, but such exemption to be only by general law. This is an implication that in

the absence of any law exempting it, such property would be liable to taxation. Not finding there to be any law exempting it, we can not say the city could not assess the water tax or rates it did against the property in question.

The judgment of the Appellate Court must be affirmed.

Judgment affirmed.

VICTORIA UMLAUF

v.

LEWIS UMLAUF.

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Filed at Ottawa June 21, 1882—Rehearing denied September Term, 1882.

1. APPEALS AND WRITS OF ERROR—*right of appeal in case of bill by wife for separate maintenance.* The right to an appeal from, or writ of error to, the Appellate Court is not given by statute in case of a bill by a married woman for a separate maintenance, where the original decree is for a less amount than $1000, as, where it requires the husband to pay $60 a month to the wife for the support of herself and child.

2. SAME—*right to, in general.* By section 90 of the Practice act, and section 8 of the Appellate Court act, the legislature intended that the right to an appeal from, or writ of error to, the Appellate Court to recover money or property in a civil action should be limited by the amount in controversy, as shown by the record, or by the amount of the recovery in the court below *in cases sounding in damages*, that sum being $1000.

3. SAME—*meaning of term "actions ex contractu."* The expression "actions *ex contractu*," in section 8 of the Appellate Court act, has reference to the nature of the cause of action, rather than to the form of the proceeding to enforce it. By it is meant all causes of action arising *ex contractu*, as contradistinguished from those arising *ex delicto*, without regard to whether the proceeding is at law or in equity.

4. SAME—*meaning of word "contract."* The word "contract" in law embraces not only the agreements of parties actually to do, or refrain from doing, some lawful thing, but also many other legal obligations which the law creates or implies from certain relations of the parties to each other, such as the duty of a husband to support his wife or a parent his child.

5. SAME—*penal actions are not treated as ex contractu.* The 8th section of the Appellate Court act expressly excludes "actions involving a penalty" from the category of actions *ex contractu*, and hence, for the purpose of

determining the right of appeal, every civil proceeding for the recovery of a penalty, whatever may be its form, must be treated as an action *ex delicto*.

6. SAME—*when it lies in actions ex contractu.* In actions *ex contractu* an appeal or writ of error lies, first, in cases where the amount in controversy, as shown by the record, is as much as $1000, exclusive of costs; and second, in cases sounding in damages,—that is, where the damages are not susceptible of direct proof,—where the judgment of the court below is as much as $1000, exclusive of costs.

7. SAME—*when it lies in actions ex delicto.* In actions *ex delicto* an appeal or writ of error lies, first, where the sum or value in controversy *exceeds* $1000, exclusive of costs; second, in cases sounding in damages where the amount of the recovery in the court below is as much as $1000, exclusive of costs.

8. SEPARATE MAINTENANCE—*obligation to support wife arises ex contractu.* A right of a married woman to a separate maintenance, if it exists at all, grows out of the marital relations of the parties, and falls within that numerous class of legal obligations which are known as contracts created by the law, in contradistinction to those created by the parties themselves. In such a case the record must affirmatively show that the amount in controversy is as much, at least, as $1000, exclusive of costs, to give an appeal from the Appellate to the Supreme Court.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

Mr. FRANCIS LACKNER, for the appellant.

Mr. D. J. LYON, for the appellee.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

This is a proceeding under the statute, instituted by Victoria Umlauf, against her husband, Lewis Umlauf, in the Superior Court of Cook county, for a separate maintenance. Upon the hearing of the cause that court found the equities with the complainant, and by its decree directed the defendant to pay her for the support and maintenance of herself and two children the sum of $60 per month while they lived separate from him. On appeal to the Appellate Court for

the First District this decree was reversed, and a decree was there entered dismissing the bill, from which latter decree the complainant appealed to this court.

Upon the bringing of the cause here appellee entered a motion to dismiss the appeal, on the ground no appeal lies to this court. In view of the importance of the question presented by the motion, and for the purpose of giving it greater and more deliberate consideration, it was reserved till the final hearing of the cause.

The 90th section of the Practice act gives the right of appeal from the final judgments of the Appellate Courts to this court in all "cases where the sum or value in controversy exceeds $1000, exclusive of costs." By the 8th section of the Appellate Court act a like appeal is given in all actions *ex contractu* not sounding in damages, where the amount involved is $1000 or over, and by the same section the right of an appeal is given in all cases sounding in damages, whether the action be *ex contractu* or *ex delicto*, where the judgment of the court below is $1000 or over, exclusive of costs. The legislature, in adopting these sections, clearly intended the right to an appeal, or to a writ of error, should, in all cases where the chief and direct object of the suit is to recover money or property, be limited by the amount in controversy, as shown by the record, or by the amount of recovery in the court below, "*in cases sounding in damages.*" As has been heretofore said, all rights of action which have for their object the recovery of money or property must, in contemplation of law, arise either *ex contractu* or *ex delicto*, in the extended sense of those terms; and as was held in the *Baber case*, 93 Ill. 342, the legislature, in using the expression "actions *ex contractu*," in the 8th section of the Appellate Court act, had reference to the nature of the cause of action rather than to the form of the proceeding for its enforcement. By it they manifestly meant all causes of action arising *ex contractu*, as contradistinguished from those arising *ex delicto*,

without regard to whether the proceeding was at law or in equity.

The term "contract," in its popular signification, is generally limited to actual agreements between determinate contracting parties, but in law it has a much more extended signification. There are many duties and obligations growing out of certain relations which are regarded by the law as species of contracts, where it is clear there never was any actual agreement between the parties to such relations. Hence it is said by Mr. Bishop, in defining a contract, that "a contract is a promise from one to another, either made in fact, *or created by the law*, either to do, or refrain, some lawful thing," etc. (Bishop on Contracts, secs. 1, 5, 72.) There are many familiar illustrations of this doctrine, such as the legal obligations which grow out of the relation of husband and wife, parent and child, joint creditors, co-sureties, client and attorney, and the like.

It is the duty of the husband to support his wife, and if he refuses to do so, and others supply her with necessaries suitable to the husband's condition in life, the latter, except under special circumstances, will be liable to those furnishing them, although supplied contrary to his express orders. Here, notwithstanding it affirmatively appears there was no actual agreement or understanding on the part of the husband to pay for necessaries thus furnished, yet, since it was his duty to do so, the law nevertheless implies such an agreement, and enforces it precisely in the same manner as if it had been expressly entered into by him. On the same principle statutory penalties, although of a *quasi* criminal nature, and universally imposed for some delict or wrong, yet, for purposes of enforcement against the wrongdoer, they are generally treated as a species of contract, and hence an action of debt is the ordinary form of action for their recovery. The 8th section of the Appellate Court act, however, by an express provision excludes "actions involving a penalty" from

the category of actions *ex contractu*, and hence, for the purposes of determining the right of appeal, every civil proceeding for the recovery of a penalty, whatever may be its form, must be treated as an action *ex delicto*. The legislature, in thus classifying cases involving penalties, affords another strong proof, in addition to those mentioned in the *Baber case*, that its classification of cases, for purposes of appeal, is based upon the nature of the cause of action rather than the form of the proceeding selected for its enforcement. As every right of action for the recovery of a penalty *arises ex delicto*, it is more philosophic and in consonance with scientific legal principles to classify such cases, as the legislature has done, with actions for torts.

Using the expressions *ex contractu* and *ex delicto* in the sense already stated, it may be said, in general terms, that for the purposes of appeals and writs of error all civil actions that have for their direct object the recovery of money or property, whether real or personal, tangible or intangible, belong to one or the other of these classes. In the former,—that is, in actions *ex contractu*,—an appeal or writ of error lies, first, in cases where the amount in controversy, as shown by the record, is as much as $1000, exclusive of costs; second, in cases sounding in damages,—that is, where the damages are not susceptible of direct proof,—where the judgment of the court below is as much as $1000, exclusive of costs. In actions *ex delicto* an appeal or writ lies, first, where the sum or value in controversy *exceeds* $1000, exclusive of costs; second, in *cases sounding in damages*, where the amount of recovery in the court below is as much as $1000, exclusive of costs. It will be thus seen that all cases sounding in damages, whether the cause of action arises *ex contractu* or *ex delicto*, stand precisely upon the same footing. In either case the right to an appeal or a writ of error depends upon the amount of recovery in the court below, and the only difference between actions *ex contractu* and

actions *ex delicto*, not sounding in damages, so far as the right of appeal is concerned, is, that in the latter class of cases the amount in controversy must *exceed* $1000, exclusive of costs, whereas in the former class it is sufficient if the judgment is as much as $1000, exclusive of costs.

An exception to the general view here expressed has been recognized by a majority of this court in *quasi* criminal cases, such as actions for penalties and bastardy proceedings. This class of cases, contrary to the views of the writer of this opinion, has been placed upon the same footing with criminal cases, and appeals and writs of error are allowed in them, without regard to the amount sought to be recovered or the judgment of the court below.

The object of the proceeding under consideration is to recover money from the husband for the maintenance of the wife, and it is prosecuted upon the assumed legal hypothesis that, under the circumstances alleged and proved, he is bound to pay the amount sought to be recovered for the purpose in question. Assuming there is a right of recovery at all, it clearly grows out of the marital relations of the parties, and hence is brought within that numerous class of legal obligations which are known to the law as contracts created by law, in contradistinction to those created by the parties themselves. They are also sometimes distinguished from other contracts as *quasi* contracts. Viewed in this light, it is clear the record must affirmatively show the amount in controversy is as much, at least, as $1000, exclusive of costs, otherwise the appeal was improvidently taken. Upon looking at the record, we discover the parties themselves have fixed the amount of recovery at $60 per month, provided the court is of opinion there should be a recovery at all. Now, it is clear from this stipulation there is not necessarily involved in this suit as much as $1000. There is no certainty that the present relations between the parties will exist any considerable length of time, and we are aware of

no principle that would warrant a presumption the one way or the other upon that subject. A resumption of the conjugal relations, or the death of either party, would operate as an extinguishment of the claim. The fact that the claim might in the course of time,—assuming their present relations to continue,—amount to as much as $1000, we do not regard as sufficient to give this court jurisdiction. Before the right of appeal attaches in a case like this, it must clearly appear from the record there is involved in the controversy, independent of all contingencies, the amount of $1000, exclusive of costs. Testing the present case by this rule, it is clear the appeal does not lie, and will therefore have to be dismissed.

It is urged, however, this suit is not simply a suit for the recovery of money; that its chief object is to establish the *status* of the parties. We do not regard this position as tenable. No question of *status* is raised either by the pleadings or evidence. The relation of husband and wife exists between the parties, and they are living apart. These are conceded facts, about which there is no controversy. She seeks to recover money from him for her support and maintenance, and her right to do so depends upon whether their living apart is without her fault, and this is all.

Appeal dismissed.

Mr. CHIEF JUSTICE SCOTT: I do not concur either in the reasoning or conclusion of this opinion.

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GYSBERT DE CLERQ *et al.*
v.
FRANCIS JACKSON *et al.*

Filed at Ottawa May 12, 1882—Rehearing denied September Term, 1882.

1. PURCHASER—*when he will hold subject to equities against his grantor—title held in trust.* Where one person acquires real estate, but has the deed made to another for his benefit, the grantee is but a trustee for him, and subject to the same equities that would have applied against the beneficiary had the conveyance been made to him, and the same rule applies to a grantee of the trustee who does not pay for the property until long after the filing of a bill to impeach and avoid the several conveyances.

2. CREDITOR'S BILL—*as against one holding under a deed which is a mortgage.* Where one having notice that an absolute deed is only a mortgage to secure a debt, procures a deed from the mortgagee, he will occupy the position of assignee of the mortgage, and his title will not be subjected, on creditor's bill, to the payment of a judgment against the mortgagor, when no redemption from the mortgage is sought. The creditor will be required to pay him the mortgage debt before divesting him of his title.

3. PAYMENT—*whether a particular transaction amounts to a payment.* A person conveyed four lots to an agent of an insurance company to secure the payment of notes to the company for money loaned, and also assigned a policy of insurance upon his life to the same agent, as security for the payment of two other notes given the company for another loan, and the agent gave back a writing, stating that if the notes, or either of them, was not paid, the agent might surrender the policy to the company for its value, to be determined by the officers of such company, and such sum should be applied upon the four notes, whether due or not. The policy was not surrendered to the company upon any terms, but the agent assigned the same to another person: *Held*, that the contingency on which the proceeds of the policy were to be applied on the notes never happened, and that payment of the notes could not be held as against one acquiring the lots from the grantee of the debtor.

4. SAME—*satisfaction of a judgment—conveyance of land to be applied thereon.* Where the beneficial plaintiff in a judgment takes a conveyance of a lot to be applied in payment on the judgment, no price being agreed upon for the lot, or as collateral security for the payment of the judgment, such conveyance will not operate to satisfy the judgment, so as to prevent the subsequent issue of an execution, and a levy and sale thereunder. The judgment creditor in such case, in the absence of proof of the value of the lot conveyed, will be held as having been paid only the net sum realized from the property above all prior liens and incumbrances paid by him to make the title clear and good.

APPEAL from the Superior Court of Cook county; the Hon. GEORGE GARDNER, Judge, presiding.

Mr. H. M. MATTHEWS, for the appellants.

Mr. JOHN P. WILSON, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This was a bill in chancery, by certain judgment creditors of Obadiah Jackson, deceased, to subject real estate, whereof they claim he died seized, to the payment of their judgments. Of the real estate in question four lots were conveyed by Jackson, in his lifetime, to Lewis C. Grover, and subsequent to Jackson's death Grover conveyed the same lots to Alice M. Bradford, and she conveyed them to the Chicago West Division Railway Company. At the time the lots were conveyed by Jackson to Grover, and as a part of the transaction, an agreement in writing was entered into, whereby it was, among other things, agreed as follows:

"Whereas, Obadiah Jackson and wife have conveyed by warranty deed, dated September 5, 1876, lots 51, 52, 53 and 54, in C. R. Field's subdivision, etc., and said deed, though in form absolute, is, in reality, given to secure the payment of two notes of Obadiah Jackson, for $1750 each, to the Mutual Benefit Life Insurance Company, of Newark, New Jersey, one in nine and the other in twelve months, with seven per cent interest; and whereas, the said Grover has delivered *in escrow* to Nehemiah Perry a quitclaim deed of said lots, executed by him to the said Jackson: Now, if the two notes are paid at maturity, said Perry shall deliver the said quitclaim deed to the said Jackson; but if the said two notes are not paid within sixty days of their maturity, respectively, then the said Perry shall return the said quitclaim deed to the said Grover, and the said Grover shall deliver the said notes to the said Jackson, and the deed and title of said lots be absolute in the said Grover, or the said Grover

may cause the mortgage to be foreclosed in equity. And whereas, the said Jackson has assigned policy No. 58,050, in the said Mutual Benefit Life Insurance Company, at Newark, New Jersey, on his own life, to the said Grover, which assignment, though in form absolute, is a security for the payment of two notes, dated September 5, 1876, of said Jackson, for $1750 each, to the said insurance company, one in three and the other in six months, with seven per cent interest: Now, if these two notes are paid at maturity, the said Grover shall re-assign said policy to said Jackson, and if said notes, or either of them, is not paid at maturity, the said Grover may surrender to said insurance company said policy, for the value thereof, to be determined by the officers of said company, and such sum shall be applied upon the four promissory notes herein described, whether they are due or not due."

In March, 1877, Obadiah Jackson assigned this insurance policy to Francis Jackson, who thereafter, until Obadiah's death, paid the premiums on the policy. After the death of Obadiah Jackson, Francis Jackson, through his attorney, proposed to the insurance company to exercise its right to surrender the two notes secured upon the four lots, take the title to them, and he would purchase them, paying therefor the amount due on the two notes surrendered, and also to purchase of the company judgments which it had obtained on the other two notes. The proposition was accepted, and the contract thus closed was carried out. By direction of Francis Jackson the four lots were conveyed to his sister, Alice M. Bradford.

The case must be considered just as if the title to the property were in Francis Jackson, for Alice M. Bradford was but a trustee for him, and it appears the railroad company did not pay for the property until long after the filing of the bill. But, as between Francis Jackson and these complainants, it is quite clear that he is, at least, entitled to occupy

the position of assignee of a mortgage, and the bill does not seek to redeem from his mortgage. He purchased whatever right the insurance company had in these four lots. If it was an absolute title, he got an absolute title. If they held them only as mortgages to secure the payment of the two promissory notes, then he purchased their right to have them subjected to the payment of the amount due upon those notes.

It is claimed on behalf of appellants, however, that Francis Jackson was bound to apply the proceeds of the insurance policy in satisfaction of these notes. The policy was certainly not assigned to him by Obadiah for that purpose, but, as the evidence shows, in part security or indemnity for a large indebtedness from Obadiah to Francis, growing out of the settlement of their deceased father's estate, and the only ground for claiming that the proceeds should be so applied is the language of the agreement between Obadiah Jackson and the insurance company, that "if said notes, or either of them, is not paid at maturity, the said Grover may surrender to said insurance company said policy, for the value thereof, to be determined by the officers of said company, and such sum shall be applied upon the four promissory notes herein described, whether they are due or not due." But the sufficient answer to this position is, "said Grover did not surrender to said insurance company said policy" upon any terms. On the contrary, it was assigned to Francis Jackson, and he subsequently paid at least one installment of premium upon the policy. The contingency in which the proceeds of the policy were to be applied to the payment of the four notes, never happened.

As to the other real estate sought to be reached, the facts are substantially these: On the 24th of August, 1876, Obadiah Jackson gave his judgment note for $7000, guarantied by Horace White, to the Commercial National Bank. White was compelled to pay the note, and, at his instance and for his benefit, the bank thereupon assigned the note to

David Vernon, and on the 14th day of November, 1876, judgment was entered thereon in favor of Vernon, for the benefit of Horace White, for $7071.75. On the 21st of the same month, Obadiah Jackson and his wife conveyed to Horace White the premises known as 375 Dearborn avenue, on account of the same indebtedness for which the judgment was rendered, and on the 25th of the same month an execution was issued on the judgment, and levied on certain household goods, pictures, etc., belonging to Obadiah Jackson, from the sale of which White realized $3438.75, less sheriff's fees, $61.25, and custodian's fees, $10, which had to be deducted. On March 22, 1877, Horace White, through his attorneys, caused the judgment to be assigned to John P. Wilson. On the 13th of April, 1877, an *alias* execution was issued upon the judgment, and subsequently levied upon certain lots in Cook county, which were sold to John P. Wilson; and it is claimed this sale should be set aside, because the judgment had been paid before it was assigned to Wilson.

The evidence, in our opinion, shows the deed for 375 Dearborn avenue was in the nature of collateral security for the judgment. White says Jackson had promised him a deed of the property before he obtained the judgment, but neglected so long to execute it that he despaired getting it, and so had the judgment entered. When the deed was executed no agreement was made, no price was fixed upon the property, and at no time was there any agreement of how it was to be accounted for. Of course both parties understood it was a payment on the debt evidenced by the judgment; but in the absence of an express agreement that it should be accepted in absolute satisfaction of the debt, it could only be equitable to treat it as a payment to the extent that it actually did so. What it was reasonably worth is not proved, except presumptively from the fact that White sold it to Ella Kennett for $19,000. Let this be regarded, however, as its reasonable value, and we have this result: Value of

property, $19,000; but it was incumbered, and to relieve those incumbrances, so as to realize this amount, he had to pay, on foreclosure sale under bank trust deed, $10,000; he had also to pay, in consequence of back taxes, mechanics' liens, special assessments, etc., $2898.26; then White had to deposit with J. H. Reed, as security to George Crozier, assignee of a mortgage covering a small portion of this ground, with other property, $500; and he had to pay Francis Jackson, also, who owned one-third of the property, $2000,—making a total of $15,398.26; this, deducted from the value of the property, left to apply on the judgment only $3601.74. But even this is not free to be applied on the judgment. White had to execute two bonds for $5000 each, —one to Jeannette Smith and the other to George Crozier,— to indemnify them from loss for releasing a mortgage on a portion of this property in the event that Francis Jackson should succeed in his claim to one-third of the property. What that amount may be is not yet known, and of course was not, and could not have been known when the judgment was assigned. Necessarily, therefore, when the judgment was assigned, this was the state of facts: There was a judgment for $7071.75; credited by amount realized on execution sale, after deducting sheriff's and custodian's costs, $3367.50—balance due, $3704.25; and to meet this, an indefinite balance between $3601.74 and nothing, to be ascertained after settling the liability of White on the two $5000 bonds.

The judgment then, it is clear, was not, in fact, paid. Had Obadiah Jackson, on the day the judgment was assigned, filed a bill alleging and showing these facts, it can surely admit of no doubt that he would not have been entitled to have a decree entered that the judgment was satisfied. As between him and White, it was not satisfied, and is not yet satisfied. White then had in the judgment, notwithstanding these transactions, something to assign—there was a bal-

ance due on the judgment upon which an execution could issue, and which an assignee could take by assignment.

Although White says he assigned the judgment for the benefit of Obadiah Jackson, and because he requested it, this does not accurately disclose the real nature of the transaction. Francis and Obadiah Jackson were brothers, and Obadiah, as Francis testifies, and has been before shown, had become indebted to him, on account of the division of their father's estate, many thousands of dollars. He found he was breaking up, and, not unnaturally, felt an anxiety to save something for his brother. His request to have the judgment assigned to Wilson was not for his own use, but for that of his brother, Francis, and not because the judgment had been paid, but because there was a balance due upon it. The parties did not treat the judgment as satisfied, but as still subsisting, and whether the consideration as between White and Francis Jackson was sufficient, is not material. Whether Wilson shall be held to be the trustee of Francis Jackson or of Horace White, concerns only those parties. If there was a balance unpaid on the judgment,—if the judgment was not, in equity, satisfied and discharged before the sale of these lots,—the sale is regular, and can not be set aside. Upon what terms subsequent creditors would be entitled to redeem from this sale, is a question not before us. The bill is framed upon the theory of the illegality of the sale, upon the ground that the judgment had been previously satisfied, and seeks to enforce no right of redemption.

We think there was a subsisting unsatisfied balance due upon the judgment, upon which an execution might issue; and so believing, it follows we approve of the decree of the court below. It will, therefore, be affirmed.

Decree affirmed.

JOHN SEELEY WALLACE

v.

CYTHERA M. RAPPLEYE *et al.**

Mr. JUSTICE DICKEY, also dissenting:

This case has been passed upon twice by this court. In September, 1881, the decree of the Superior Court of Cook county was affirmed. On rehearing, granted upon petition of appellant, and upon further consideration, the present result is reached.

In affirming the decree on the first hearing, this court, speaking by Mr. JUSTICE MULKEY, said:

"The controverted questions presented for our determination by the present record, arise upon the cross-bill of Mrs. Rappleye, and the answer thereto of John Seeley Wallace. The cross-bill is in the nature of a bill for the specific performance of the alleged contract between John Seeley Wallace, deceased, and Jane Slover, the mother of Mrs. Rappleye. A number of objections to the propriety of the decree of the court below are urged with much earnestness and marked ability, and while it is conceded the case is not free from difficulty, yet, upon a very careful consideration of it, we are of opinion that the decree is warranted by the law and the evidence.

"In the first place, it is claimed that the agreement between Wallace and Jane Slover has not been clearly and satisfactorily proven. If this objection is justified by the facts appearing of record, it is certainly fatal to the decree, for it is a well recognized principle of the law of specific performance that courts of equity will not decree the specific performance of an alleged contract where there is a reason-

*The principal opinion in this case will be found in this volume, *ante*, p. 229. This dissenting opinion by Mr. JUSTICE DICKEY was omitted from its proper place at the close of the case on page 262.

able doubt as to the existence of such contract,—or, in other words, where it has not been clearly and satisfactorily established. If the proof of the present contract consisted alone of the testimony of Jane Slover, the difficulty in sustaining the decree would be much greater than it is; yet even her testimony, when considered in the light of surrounding circumstances, and the very rigid and exhaustive cross-examination to which she was subjected, has much inherent force in it. In passing upon her testimony, it must be remembered that she is evidently a woman of no culture, and has lived in comparative poverty and obscurity all her life, and it is not therefore to be expected that she would acquit herself upon the witness stand, under the pressure of a searching cross-examination, especially upon unimportant incidents connected with the affair which did not impress themselves upon her memory, with the same degree that she probably would if her opportunities in life had been better. Upon the vital question of the agreement and its terms, although required to repeat them often through her long and skillful examination, she is consistent with herself throughout. Counsel even object to her testimony on the ground that she can not be moved from her position upon the vital point in the agreement, namely, that her child was to be adopted and made the heir of Wallace, while she fails to sustain herself so well on less important matters. We do not think the conclusion is just. It is not reasonable to suppose that she would remember mere collateral details and conversations between herself and Wallace, that did not directly affect the well-being of her child. On the other hand, no lapse of time would probably ever efface from her memory the substance of the terms upon which she surrendered forever all right and claim to it. According to her statement, the terms of the agreement are few, pointed, and of marked significance. That the child was given to Wallace upon some kind of an understanding between them, can not, in the light of the

admitted circumstances, be doubted, and there is no evidence in the record tending to establish any other agreement than that testified to by her; and since she is strongly corroborated by other witnesses and all the circumstances in the case, we must accept her statement of it as true. It contains, as just remarked, but a few plain, pointed provisions,—just such as an uneducated, simple, confiding young mother under such circumstances could never forget. She was to give Wallace her child and abandon it forever, and he was to take it to his home and raise and educate it as his own child—adopt it and make it his heir. There was no misunderstanding or forgetting of these terms by either of the parties. The lives and subsequent conduct of both the contracting parties demonstrated this beyond all controversy. The agreement was faithfully executed on the part of the mother and the child, and with equally good faith was honestly attempted to be carried out by Wallace in his lifetime, and by his daughter, Frank, since his decease, whose noble and generous conduct in the affair challenges the highest admiration; and the question simply remains, whether the undoubted objects and purposes of both parties to the agreement shall be carried out in good faith, or be defeated.

"It is also urged that the agreement is not sufficiently specific to warrant a court of equity in decreeing its execution. We do not think so. The agreement on the part of Wallace, as we have just seen, was to adopt the child and make it his heir. That meant something more than to merely confer on it the capacity of inheriting his estate. That alone might or might not be of any practical benefit, depending upon whether or not he made a will, and if so, the character of its dispositions. What was really intended and obviously understood by the parties was, that Wallace was to adopt such legal measures as would secure to the child the same interest in his estate as she would, on his dying intestate, succeed to if a legitimate child. If, as is claimed,

there was no law at that time by which Wallace could confer upon her the capacity of inheriting his estate upon his intestacy, to give the contract any force at all it must be construed as an undertaking on his part to secure to her by deed, will, or some other appropriate means, so much of his estate, subject to distribution at the time of his death, as she would have been entitled to, if a legitimate child, upon his dying intestate; for it is manifest, to give it the construction contended for would render it inoperative altogether. This we are not prepared to do.

"It is also contended that there is no sufficient consideration to support the agreement in question. We think otherwise. The liability of Wallace to support the child, and the surrender of its custody on the part of the mother, at his request, afford a sufficient consideration for the undertaking on his part; and that a contract of this character is valid and binding, is fully sustained by the following authorities: *Allen* v. *Dawson*, 16 Ind. 417; *Hook* v. *Pratt*, 78 N. Y. 376; *Ridley* v. *Ridley*, 11 Jur. N. S. 475; *Alderson* v. *Maddison*, 5 Exch. 293; *Taudus* v. *Ansley*, 4 Ves. 501; *Hammersley* v. *DeBeel*, 12 Cl. & Fin. 45; *Prole* v. *Soady*, 2 Giff. 1; *Johnson* v. *Hubbell*, 10 R. I. 335; *Wright* v. *Tinsley*, 30 Mo. 396.

"The enforcement of the agreement is also resisted, on the ground that it is not in writing, and therefore falls within the Statute of Frauds. Conceding the contract, when originally made, was obnoxious to this objection, yet we are of opinion that, inasmuch as it has been fully performed on one side, it would be a fraud upon complainant to permit that objection to prevail now. The evidence shows there has been such a performance of the contract as to take it out of the operation of the statute; hence it is unnecessary to inquire whether the contract, as originally made, was within the statute or not. *Gupton* v. *Gupton*, 47 Mo. 40; *Van Dyne* v. *Vreeland*, 11 N. J. Eq. 371.

"Finally, the agreement between Wallace and his divorced wife is relied on as a defence to the relief sought upon this cross-bill. If the contract relied on in the cross-bill is valid, as we have seen, it is difficult to perceive how Mrs. Rappleye's rights can be affected by the subsequent contract with Mrs. Celia W. Wallace. Viewed from appellant's own standpoint, the most that can reasonably be claimed is, that the equities of himself and Mrs. Rappleye are equal, and if so, the latter's, being first in time, should prevail. But we are unable to see anything in that agreement that is in conflict with her rights. The manifest object of it was to bind Wallace not to discriminate against his son in the distribution of his property by devising it to his other child or children. The agreement evidently was not intended to affect interests in his estate that had already been legally conferred on another."

I approve so heartily of what was then, as I think, so aptly said, that I adopt the words as my own.

I wish, also, to say, that it now does not seem to me that the fact that Mrs. Matthews got the impression in November, 1879, that the paper presented to her by Rappleye at that time had been brought by him from Chicago, when in truth it was prepared by Rappleye at Fort Scott, after he had, in conversation with her, found what she did remember, has the slightest bearing against the accuracy of her memory of the events of her early days. The experience of every person of mature years teaches the universal truth that the events of early life are preserved in the memory far more accurately and more vividly than intervening events of a much later date. This remark is equally applicable to the matter of the memory of the witness Van Auken. Nor do I see any substantial difference between the effect of the testimony of that witness without prompting, and that called out by the leading question which followed. Were the words used in a pleading,

a difference might well be alleged; but when an unlettered witness said, of Wallace: "He said he agreed to take the child and bring it up as his own, to educate and treat it as his own child, and he wanted it as heir to his property,—that is, the only heir he had," etc.,—does not this language carry the idea that the proposition "to make the child an heir" was a part of the agreement and arrangement made with its mother? It adds nothing in substance, then, for the witness to say, in addition, that he wished to be understood that Wallace "agreed with Jane that the child should be his heir." It is not the recollection of particular phrases, at the distance of thirty-five years, on which reliance is to be placed, but the recollection of the *substance* of what was said.

Keeping in view the uniform course of conduct by Wallace through a long course of years, his attempt to adopt the child, and his evident supposition that he had made the child his heir by adoption, it does not require very clear proof in addition thereto to convince the mind fully that he did agree to do so, and as an honest man he diligently tried to do so, and died under the belief that he had faithfully kept his contract. The circumstantial evidence that he did so promise to Jane, is, to my mind, very cogent. The consideration for the promise, which gives it force in my mind, was the promise of Jane that she would absolutely surrender the child, forbear to visit it, and so act that the child might successfully be held out as the legitimate child of Wallace. During all these years she faithfully kept that promise, notwithstanding the maternal yearnings prompting her to a different course of conduct. So faithfully was her part of this contract performed that the child never suspected she was other than a legitimate child of Wallace and his wife, until shortly before her marriage. There was no fraud in the contract, at the time when it was made, which could possibly affect the existing rights of any one; for the then

wife of Wallace was at that time made cognizant of the whole affair, acquiesced in the arrangement, and did her part toward carrying it into effect.

Nor do I see that the contract of April 10, 1872, made between Wallace and the mother of John Seeley Wallace, stands at all in the way of the just claim of Mrs. Rappleye. That contract was, that the property of the father's estate owned by him at his death, "shall be so divided that his son (the appellant) shall have the same share as he would take under the laws of Illinois were his father to die intestate." The father did die intestate, hence the rights of appellant are just what they would have been had no such contract been made. The contract of April 10, 1872, by its very terms, is to be operative only in case the father made a will. So much for the letter of that contract.

Departing from the letter, and seeking the meaning and intention of the parties, we find that at that time the illegitimacy of appellee was known only to very few. It does not appear to have been known to the mother of appellant. She did know that Mrs. Rappleye was recognized by every member of the family as one of the prospective heirs of the father. The substance of the contract was, that appellant should not be deprived of his right to inherit one-third of the estate by any will which his father might make.

The eminent justice of the claim asserted by Mrs. Rappleye is so palpable to my mind, and so well sustained by the facts, that I think the decree of the trial court ought to be affirmed.

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ABATEMENT.

PLEA IN ABATEMENT.

1. *Requisites.* A plea of the bankruptcy of the plaintiff and the transfer of his property and rights to an assignee after the commencement of the suit, in abatement of the action, without any prayer of any kind, is subject to demurrer. *Chicago and Northwestern Railway Co.* v. *Jenkins*, 588.

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AS EVIDENCE. See EVIDENCE, 3.

ACCOMMODATION PAPER.

DEFINED.

1. Accommodation paper is either a negotiable or non-negotiable bill or note made by one who puts his name thereto without consideration, with the intention of lending his credit to the party accommodated. As between the party accommodated and the maker, the note or bill is not collectible. *Miller et al.* y. *Larned et al.* 562.

WHAT CONSTITUTES.

2. Land actually belonging to A, stood of record in the name of B, who conveyed the same to C, taking back C's two promissory notes to B, for $6000 each, secured by deed of trust upon the land, and B, the payee, indorsed the same in blank, and delivered the same to A, with the understanding of all parties that the notes were to be used by him as he pleased, without any restrictions, the conveyance in fact not being in pursuance of any contract of sale: *Held*, that such notes were to be taken and treated as accommodation paper. Ibid. 562.

AS TO USE OF SUCH PAPER—DEFENCES.

3. It is a principle of general application that the beneficiary of an accommodation note without restriction as to the mode of its use, may transfer it, either in payment of his indebtedness, or as collateral security for a concurrent or even an antecedent debt, and the maker will have no defence. Ibid. 562.

4. As to the holder of an accommodation note into whose hands it has come in the usual course of business for a valuable consideration,

ACCOMMODATION PAPER.

AS TO USE OF SUCH PAPER—DEFENCES. *Continued.*

the maker will have no defence, and it makes no difference that the holder may have taken the note with full knowledge that it was accommodation paper. *Miller et al.* v. *Larned et al.* 562.

5. The assignee of a mortgage takes it subject to the same equities that have attached to it in the hands of his assignor. But this rule does not apply to one pledging a note secured by mortgage not payable to him, but held by him under a blank indorsement of the payee, as to which paper he is not a party. Equities against such pledgor will not affect the pledgee or holder of such note. Ibid. 562.

6. The rule that a mortgagor having the oldest equity may make the same defence against an equitable assignee as he could against the assignor, has no application to an assignee or holder of accommodation paper secured by mortgage. The maker of such paper can not make any defence against one who has taken it in good faith in the usual course of business. Ibid. 562.

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7. *Whether it should accompany the paper secured.* Where accommodation paper which is secured by a mortgage has been indorsed and placed in a bank as collateral security for a loan, it is not essential to the protection of the rights of the bank in respect to the security afforded by the mortgage, that the mortgage itself should have passed to the hands of the bank concurrently with the notes secured by it. The assignment of the notes carried with them an equitable assignment of the mortgage, and it did not matter that the assignee did not at the same time obtain possession of the mortgage. That he could obtain at any time when needed. Ibid. 562.

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8. *For accommodation of vendor—rights of third persons.* Although the sale of real estate is colorable and for the accommodation of the vendor or real owner, yet as to third persons who have in good faith acquired an interest in the notes given for the purchase money, or the property itself, the vendee or nominal purchaser will not be permitted to allege his purchase was for the mere accommodation of the vendor, and for that reason not binding on him. As to such third persons all parties to the transaction will be concluded by the record they have made, and it will be treated as an absolute sale. Ibid. 562.

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9. *For accommodation paper—by whom—and under what circumstances.* Accommodation paper, so long as held by the beneficiary, may be negotiated for his benefit even after maturity; and while such paper is in such condition it is not in the power of the beneficiary to release the lien of a trust deed securing the same, given by the maker on land of the beneficiary conveyed to the maker for his protection and indemnity,

ACCOMMODATION PAPER. RELEASE OF SECURITY. *Continued.*

nor can any one else release the same, and the trustee can not, without evidence of the surrender of such paper to the maker or its cancellation otherwise. *Miller et al.* v. *Larned et al.* 562.

PLEDGE OF ACCOMMODATION PAPER.

10. *And payment of the principal debt—whether a discharge of a mortgage given to secure the paper pledged, as against holders of such paper pledged a second time.* A, the owner of real estate, procured B, in whom the record showed the title, to convey the same to C, for C's two notes, of $6000 each, secured by deed of trust on the premises to D, and C then conveyed the premises to A, who conveyed the same by warranty deed to E for the full value of the land. Before the conveyance to E, B had indorsed the notes in blank to A, who had pledged them as collateral security to a bank for a loan of $10,000; but A's name did not appear upon the notes so pledged, or his interest therein. Afterwards A paid off his debt and took up the notes of C which were pledged, but still left them with the bank, and some time afterwards again pledged them as collateral security for another loan from the bank, and the bank transferred A's note with the collaterals to innocent purchasers for value. E contended that when A paid off his first note of $10,000, and redeemed the pledge of the notes which were secured by the trust deed, that deed was discharged, and the debt secured by it paid: *Held*, that the trust deed was not thereby discharged, and that the notes of C, though accommodation paper, still remained valid obligations in A's hands, and that the second pledge of them was valid. Ibid. 562.

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USE OF CORPORATE SEAL.

2. *Presumption.* Where an appeal bond purporting to have been executed in the name of a railroad company by its general attorney, has the seal of the corporation attached, the presumption will arise that the person using the seal had authority to do so.* *Indianapolis and St. Louis Railroad Co.* v. *Morganstern*, 149.

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3. *Extent of authority given thereby.* See POWERS, 1.

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4. *By attorney in fact—its effect.* See TOWN PLAT, 1.

*Where it is recited in the body of an appeal bond given on appeal by a private corporation, that the company by its corporate name had entered into the obligation, and the bond is signed by the president and secretary of the company, and sealed with its corporate seal, that will be a sufficient execution of the bond in the name of the corporation. *Bills et al.* v. *Stanton*, 69 Ill. 51.

An appeal bond copied into the record, purported to have been executed by the Illinois Central Railroad Company, by an attorney in fact, with a scrawl attached,—it was held, on a motion to dismiss for want of the corporate seal, that the court did not know, judicially, that the company had a seal other than the scrawl such as appeared in the record. *Illinois Central Railroad Co.* v. *Johnson*, 40 Ill. 35.

In copying into the transcript of a record an appeal bond purporting to have been executed by a corporation, the corporate seal, if attached thereto, may be represented by a scrawl. A *fac simile* of the seal or device can not be made in the copy. Ibid.

Where an appeal bond, purporting to have been executed by an attorney in fact, was approved by the court from which the appeal was taken, it will be presumed there was before that court sufficient evidence of the authority of the attorney to execute the bond in behalf of his principal. Ibid.

In *Cromwell* v. *March*, Breese, (Beecher's ed.) 326, a *supersedeas* bond was executed by "Murray McConnel, attorney for the plaintiff." The *supersedeas* was quashed for the reason it did not appear that McConnel was authorized to sign the bond as attorney. But it was held in *Campbell* v. *The State Bank*, 1 Scam. 423, where a *supersedeas* bond purported to have been executed by a person as attorney in fact, in the name of his principal, and the authority of the attorney did not appear, this court would presume that the attorney had authority to execute the bond unless his authority was questioned by affidavit.

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By adding other security—will not affect the rights of the ward. See GUARDIAN AND WARD, 2.

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1. *What regarded as an amendment.* After the filing of an original bill to set aside a sale of lots for unpaid special assessments, on the ground that the ordinance under which the assessment was made was illegal and void, a supplemental bill was filed showing a subsequent sale of the same property to the same purchaser, and a redemption from such sales within the time provided by law, but that the purchaser had taken out deeds on the sales, which it prayed to have set aside: *Held*, that the supplemental bill was a mere amendment, and as an amendment was proper, and that the bill as amended was not multifarious, the matters in the two bills not being distinct and unconnected. *Gage* v. *Parker*, 528.

2. *Retaining bill to grant complete relief—effect of amending bill.* Where a court of chancery once obtains jurisdiction of a cause on any equitable ground, a subsequent amendment of the bill asking other relief will not deprive the court of jurisdiction to grant complete relief. When the court acquires jurisdiction for one purpose, it may go on and do complete equity between the parties. Ibid. 528.

3. *Changing prayer for relief of a different kind.* There is no error in allowing an amendment of a bill by a vendor of property for the specific performance of the contract by changing the prayer for a cancellation of the contract. The defendant has no vested right in the phraseology of the bill. *Papin et al.* v. *Goodrich et al.* 86.

AS TO CHARTER OF PRIVATE CORPORATION.

4. *Whether amendment binding on the company.* See CORPORATIONS, 3.

APPEALS AND WRITS OF ERROR.

WHAT MATTERS INVOLVED IN AN APPEAL.

1. *Where there are several suits relating to the same subject matter.* Several chancery suits were consolidated and heard together, and certain of the defendants who had brought suits at law to enforce the individual liability of stockholders, and whose suits had been enjoined in the chancery suits, filed a petition claiming priority, by reason of the institution of their suits at law, of the funds collected from such stockholders. On overruling a demurrer to the petition, the claim of priority was allowed, and from that order the other parties appealed: *Held*, that the appeal

APPEALS AND WRITS OF ERROR.

WHAT MATTERS INVOLVED IN AN APPEAL. *Continued.*

only brought before the court of review the proceedings had upon the petition filed in the consolidated cases. *City of Chicago et al.* v. *Hall et al.* 342.

BY ONE OR MORE OF SEVERAL PARTIES.

2. Under the provisions of the Practice act, any one of two or more parties to a suit, either at law or in equity, may sue out a writ of error to have reviewed the propriety of any final decree or judgment. *St. Louis and Sandoval Coal and Mining Co.* v. *Edwards et al.* 472.

APPEAL FROM TRIAL COURT TO SUPREME COURT.

3. *Generally—in what cases.* Since the amendatory act of 1879, amending section 88 of the Practice act, all cases involving a franchise, freehold or the validity of a statute, without regard to whether they are cases in chancery or at law, are required to be brought directly from the trial court to this court, and not to the Appellate Court. *Chicago Theological Seminary* v. *Gage*, 175.

WHETHER A FRANCHISE IS INVOLVED.

4. *In suit to wind up affairs of a corporation, and to dissolve the same.* Where a bill is filed against an insolvent corporation by certain of its stockholders and creditors, making the other stockholders parties, praying that the affairs of the corporation be wound up and the corporation itself dissolved, and its effects placed in the hands of a receiver, and a decree is granted to the same extent, a franchise is involved in the litigation, and a writ of error must be sued out, if at all, by the corporation from this court, and the fact that some of the defendants have perfected an appeal to the Appellate Court, will not deprive this court of jurisdiction of a writ of error brought by the corporation. *St. Louis and Sandoval Coal and Mining Co.* v. *Edwards et al.* 472.

WHETHER A FREEHOLD INVOLVED.

5. *Removing cloud.* A freehold is involved in all cases where real estate is claimed under a deed regular on its face, and purporting to convey title, which is sought to be set aside by an adverse claimant as a cloud upon the title of the latter, and in such cases an appeal lies directly to this court from the trial court. *Chicago Theological Seminary* v. *Gage*, 175.

6. *A proceeding to establish and enforce a mechanic's lien* against land, does not involve a question of freehold any more than a bill to foreclose a mortgage, and hence this court has no jurisdiction to review a decree giving the lien, in the first instance, by writ of error to the trial court, brought by one claiming an interest in the land. *Clement* v. *Reitz et al.* 315.

7. *On bill to redeem land from tax sale.* A bill in chancery to set aside a tax deed upon the ground it is without a seal, and so inoperative as an instrument of conveyance, is, in effect, simply a bill to redeem.

APPEALS AND WRITS OF ERROR.

WHETHER A FREEHOLD INVOLVED. *Continued.*

A title invalid upon its face does not amount to a cloud. And while a redemption in such case may ultimately affect a freehold, the question of the right to redeem does not involve a freehold. So the case can not be brought from the trial court directly to this court for review, there existing none of the other conditions to give jurisdiction. *Gage* v. *Starkweather*, 559.

VALIDITY OF A STATUTE—WHETHER INVOLVED.

8. *In what manner it must appear.* This court has no jurisdiction of an appeal directly from the judgment of the circuit court, when the sole question presented is, whether the court erred in holding that a garnishee was not protected by a judgment of a justice of the peace disregarding the amount of the statutory exemption in case of wages due from an employer, the appeal presenting no question of the validity of a statute or construction of the constitution. *St. Louis Transfer Co.* v. *Canty*, 423.

9. It is not sufficient to give this court jurisdiction of an appeal directly from the trial court, that counsel should claim in his brief that the claim was made below that a statute was not constitutionally enacted, and the record shows that by stipulation of the parties the journal of the House of Representatives of the session in which the law was enacted was agreed to be considered as a part of the record, when no point is made here as to the validity of the statute. Ibid. 423.

10. It is not enough for counsel merely to say the validity of the statute is involved, to give this court jurisdiction of an appeal direct from the trial court. The record must show that the validity of the statute is in good faith, and not simply pretendedly involved, to give jurisdiction on that ground. Ibid. 423.

APPEALS FROM APPELLATE COURT.

11. *In general.* By section 90 of the Practice act, and section 8 of the Appellate Court act, the legislature intended that the right to an appeal from, or writ of error to, the Appellate Court to recover money or property in a civil action should be limited by the amount in controversy, as shown by the record, or by the amount of the recovery in the court below *in cases sounding in damages*, that sum being $1000. *Umlauf* v. *Umlauf*, 651.

12. *Meaning of the term "actions ex contractu."* The expression "actions *ex contractu*," in section 8 of the Appellate Court act, has reference to the nature of the cause of action, rather than to the form of the proceeding to enforce it. By it is meant all causes of action arising *ex contractu*, as contradistinguished from those arising *ex delicto*, without regard to whether the proceeding is at law or in equity. Ibid. 651.

13. *Meaning of word "contract."* The word "contract" in law embraces not only the agreements of parties actually to do, or refrain from

APPEALS AND WRITS OF ERROR.

APPEALS FROM APPELLATE COURT. *Continued.*

doing, some lawful thing, but also many other legal obligations which the law creates or implies from certain relations of the parties to each other, such as the duty of a husband to support his wife or a parent his child. *Umlauf* v. *Umlauf*, 651.

14. *Penal actions are not treated as ex contractu.* The 8th section of the Appellate Court act expressly excludes "actions involving a penalty" from the category of actions *ex contractu*, and hence, for the purpose of determining the right of appeal, every civil proceeding for the recovery of a penalty, whatever may be its form, must be treated as an action *ex delicto*. Ibid. 651.

15. *When appeal lies in actions ex contractu.* In actions *ex contractu* an appeal or writ of error lies, first, in cases where the amount in controversy, as shown by the record, is as much as $1000, exclusive of costs; and second, in cases sounding in damages,—that is, where the damages are not susceptible of direct proof,—where the judgment of the court below is as much as $1000, exclusive of costs. Ibid. 651.

16. *When it lies in ations ex delicto.* In actions *ex delicto* an appeal or writ of error lies, first, where the sum or value in controversy *exceeds* $1000, exclusive of costs; second, in cases sounding in damages where the amount of the recovery in the court below is as much as $1000, exclusive of costs. Ibid. 651.

ON BILL FOR SEPARATE MAINTENANCE.

17. *Whether an appeal will lie from the Appellate Court—as to amount in controversy.* A right of a married woman to a separate maintenance, if it exists at all, grows out of the marital relations of the parties, and falls within that numerous class of legal obligations which are known as contracts created by the law, in contradistinction to those created by the parties themselves. In such a case the record must affirmatively show that the amount in controversy is as much, at least, as $1000, exclusive of costs, to give an appeal from the Appellate to the Supreme Court. Ibid. 651.

REVIEWING CONTROVERTED QUESTIONS OF FACT.

18. *On appeals from the Appellate Court.* On affirmance of a judgment in assumpsit by the Appellate Court, it will be taken that such court found the facts the same as the jury, and this court is precluded from inquiring into the correctness of such finding. *Bennett* v. *Connelly*, 50.

19. This court can only look to the facts, as found by the Appellate Court, to determine whether the law was correctly applied to the facts. Ibid. 50.

20. On affirmance of a judgment or decree by the Appellate Court, in the absence of anything in the record showing what was the finding of

APPEALS AND WRITS OF ERROR.

REVIEWING CONTROVERTED QUESTIONS OF FACT. *Continued.*

fact, it will be taken to have been in the way most favorable for the support of the decision made, and this court will not review the facts. *Galena and Southern Wisconsin Railroad Co.* v. *Stahl*, 67.

21. Where the facts are found by the Appellate Court, in a suit upon a guaranty of a note, this court is precluded from their consideration further than to determine whether the law has been properly applied to them. *Ives* v. *McHard*, 97.

APPEAL FROM A PROBATE COURT.

22. A writ of error will not lie from this court to a probate court in cases where an appeal from the judgment is allowed to the circuit court. *Ennis* v. *Ennis et al.* 95.

23. An appeal being given from the final orders, judgments, etc., of the probate court to the circuit court, except in proceedings of administrators to sell land to pay debts, this court will not entertain a writ of error to the probate court to review an order dividing a widow's award between herself and her minor children. Ibid. 95.

APPEAL FROM HIGHWAY COMMISSIONERS.

24. *To three supervisors—how far and for what length of time the action of the latter is conclusive.* See HIGHWAYS, 6, 7.

APPLICATION OF PAYMENTS. See PAYMENT, 3 to 8.

APPURTENANCE.

WHAT WILL PASS AN APPURTENANCE. See DESCRIPTION, 6.

ASSIGNMENT.

EQUITABLE DEFENCES.

1. *As against a holder of negotiable paper secured by mortgage—former decisions.* It was held in *Olds* v. *Cummings*, 31 Ill. 188, that the holder of commercial paper, seeking to enforce in equity a mortgage security therefor, was subject to any defence which would have been good against the mortgage in the hands of the mortgagee himself, although such holder may have purchased the paper in good faith, and before its maturity. *Peoria and Springfield Railroad Co.* v. *Thompson*, 187.

2. But this doctrine has no application to deeds of trust given to secure railroad coupon bonds intended to be thrown upon the market and circulated as commercial paper, and to be used as securities for permanent investments. Ibid. 187.

3. So where such railroad bonds, secured by deed of trust for the benefit of the holders thereof, had been issued, and delivered to contractors engaged in the construction of the road, and by them disposed of in the market to innocent purchasers, on bill by the trustee to fore-

ASSIGNMENT. EQUITABLE DEFENCES. *Continued.*

close the deed of trust for the benefit of the bondholders, it was *held*, the unsettled equities and matters of account between the company and the contractors could not be interposed in defence against the bill. *Peoria and Springfield Railroad Co. v. Thompson*, 187.

4. A part of the reasoning of the court in *Chicago, Danville and Vincennes Ry. Co.* v. *Loewenthal*, 93 Ill. 433, is not to be reconciled with the rule here announced. But what appears in the opinion relating to the question here mentioned was said *in arguendo*, and after the case had been decided upon another distinct ground, and without any argument of the question except upon one side. Under these circumstances, it is considered that what was there said ought not to be, and is not, regarded as conclusive of the question, and the court is satisfied the view now presented is the correct one. Ibid. 187.

5. The rule that the assignee of a mortgage takes it subject to the same equities that have attached to it in the hands of his assignor, does not apply to one pledging a note secured by mortgage not payable to him, but held by him under a blank indorsement of the payee, as to which paper he is not a party. Equities against such pledgor will not affect the pledgee or holder of such note. *Miller et al.* v. *Larned et al.* 562.

6. The rule that a mortgagor having the oldest equity may make the same defence against an equitable assignee as he could against the assignor, has no application to an assignee or holder of accommodation paper secured by mortgage. The maker of such paper can not make any defence against one who has taken it in good faith in the usual course of business. Ibid. 562.

WHETHER MORTGAGE SHOULD ACCOMPANY PAPER SECURED.

7. *Where accommodation paper which is secured by mortgage* has been indorsed and placed in a bank as collateral security for a loan, it is not essential to the protection of the rights of the bank in respect to the security afforded by the mortgage, that the mortgage itself should have passed to the hands of the bank concurrently with the notes secured by it. The assignment of the notes carried with them an equitable assignment of the mortgage, and it did not matter that the assignee did not at the same time obtain possession of the mortgage. That he could obtain at any time when needed. Ibid. 562.

ASSIGNEE OF CONTRACT OF PURCHASE.

8. *Takes subject to its infirmities.* The assignee of a contract for the purchase of land takes it subject to its infirmities, and acquires no greater rights than the assignor had, and if the assignor has rescinded the contract so as to prevent him from demanding a specific performance, the assignee will also be precluded from enforcing its performance. *Parmly* v. *Buckley et al.* 115.

POLICY OF INSURANCE.

9. *Assignable only in equity.* See PARTIES, 3, 4.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

WHAT PROPERTY PASSES THEREBY.

1. A voluntary assignment, made by a failing debtor for the benefit of his creditors, if valid, passes all the property, real and personal, which the debtor at the time owned. *Freydendall et al.* v. *Baldwin et al.* 325.

JURISDICTION IN COUNTY COURT.

2. *Creditor's bill—whether it will be entertained in chancery.* In case of such assignment, the county court, by the statute, is invested with complete and full jurisdiction over the trust fund and the assignee, until the property is disposed of and the proceeds distributed to those entitled to share therein, and a court of equity, on creditor's bill, where the assignment is not questioned or impeached, will not assume jurisdiction to manage and direct the application of such fund by the assignee, unless under special circumstances, but will leave that to the county court. Ibid. 325.

3. Where a debtor has made a valid general assignment, under the statute, of all his property and effects, for the benefit of creditors, a creditor having a judgment can not maintain a bill in equity to have prior judgments against his debtor set aside on the ground they are void or fraudulent. His remedy in such a case is before the county court, which has the power to determine what creditors are entitled to share in the proceeds of the debtor's effects, and the priority of the equitable liens of the several creditors. Ibid. 325.

4. Whether judgments confessed by the insolvent debtor are void for any reason, or whether executions issued on such judgments were satisfied by a technical levy on personal property and its release, or whether such judgment creditors are entitled to priority over the other creditors by reason of their execution liens at the time of the assignment, are questions within the jurisdiction of the county court, to be decided by it in its supervision and direction of the settlement and distribution of the trust funds in the hands of the assignee. Ibid. 325.

5. The whole management of the estates of insolvent debtors, under voluntary assignments, is by law committed to the jurisdiction of county courts. How the funds in the hands of the assignee are to be paid over and distributed, are matters for the determination of the county court where the proceedings are pending, and its judgments and orders in that respect can only be reviewed on appeal or error. Ibid. 325.

ATTACHMENTS.

EQUITABLE INTEREST IN LAND.

1. *Subject thereto.* Under the act of 1869, amendatory of the chapter of the Revised Statutes of 1845, entitled "Attachments," equitable interests in lands were made subject to attachment to the same extent as legal titles. *Laclede Bank* v. *Keeler*, 425.

ATTACHMENTS. *Continued.*

INTERPLEADER.

2. *Of the issues to be tried.* This amendment was intended to obviate the prior rulings of this court that equitable interests were not liable to attachment, but not to change the law as it then stood relating to the trial of issues made on interpleader by third parties claiming the property. *Laclede Bank* v. *Keeler*, 425.

3. Where a third party interpleads in an action by attachment, claiming the land attached, and an issue is formed as to whether the debtor has an equitable interest subject to the writ, that issue should be submitted to a jury, and it is error for the court to refuse to submit it, or to exclude evidence tending to show such equitable interest in the debtor. Ibid. 425.

4. A third person filed an interpleader in an action by attachment, claiming to be the owner of the land attached. The attaching creditor replied that although the deed under which the claim was made was absolute in form, it was but a mortgage to secure the payment of $7756, and the land was worth $15,000, to which the claimant rejoined, denying that the deed was a mortgage. On the trial the claimant under the deed proved the execution of a deed from the grantee of the attachment debtor, when the plaintiff offered to prove that the deed from the debtor was in fact only a mortgage, made to secure $7756, and the value of the land, and also that claimant, when he received his deed from the grantee of the debtor, knew his grantor only held the title as a security for the debt named, and also knew of the levy of the writ when he took such deed, all of which evidence the court refused to admit: *Held*, that the court erred in rejecting the proposed evidence. Ibid. 425.

ATTORNEY AT LAW.

RECOVERY FOR SERVICES AND ADVANCES.

1. An attorney at law who performs legal services for another with his consent, and advances and pays money for his client while acting as his solicitor, in matters connected with his employment, is entitled to recover the reasonable value of such service, and the amount of the money so advanced. *Bennett* v. *Connelly*, 50.

BANKRUPTCY.

PARTIES—ASSIGNEE IN BANKRUPTCY.

1. *Substitution as plaintiff.* See PARTIES, 5.

LIMITATIONS.

2. *As to suits by assignee in bankruptcy.* See LIMITATIONS, 3.

BASTARDY.

CONTRACT IN RESPECT TO CHILD.

1. *As a bar to a prosecution for bastardy.* In the absence of any settlement or release in respect of a matter of bastardy, a contract on

BASTARDY. CONTRACT IN RESPECT TO CHILD. *Continued.*

the part of the putative father, with the mother, in anticipation of the birth of the child, that the father would adopt the child and make it his heir, would be no bar to a bastardy prosecution, or to an action for damages, in respect thereto. *Wallace* v. *Rappleye et al.* 229.

BILLS OF EXCEPTIONS. See EXCEPTIONS AND BILLS OF EXCEPTIONS.

BONDS.

GUARDIAN'S BOND. See GUARDIAN AND WARD, 2, 3.

SUPERSEDEAS BOND. See that title, 1.

BURDEN OF PROOF. See EVIDENCE, 23.

BURNT RECORDS ACT.

LIMITATION.

As to writ of error. See LIMITATIONS, 11.

CARRIERS.

IN CASE OF CONTINUOUS SHIPMENT OVER SEVERAL LINES.

1. *Liability of carrier beyond its own line of conveyance.* While it is true that a railroad carrier may by contract restrict its liability to its own line, there is no doubt that it may also extend its liability beyond its own line. *St. Louis and Iron Mountain Railroad Co.* v. *Larned*, 293.

2. So, where a railroad company in its own wrong shipped a lot of cotton from its depot in Arkansas, to Waterville, in the State of Maine, beyond the terminus of its road, and on the application of the agent purchasing the cotton, gave him a bill of lading containing a printed stipulation restricting its liability to its own line of road, naming the number of bales, and containing this entry, written in a blank: "To be forwarded from Waterville, Maine, (where the cotton is now lying) at consignee's expense. All charges for transportation to that point, and necessary charges, to be paid by him,"—and the oral evidence showed it was to be transported to Putnam, Connecticut, it was *held*, that the company was liable to the assignee of the bill of lading, the consignee, for the value of the cotton, on account of its non-delivery at Putnam. Ibid. 293.

3. *Which of two carriers liable.* An agent for eastern parties bought cotton in Arkansas, which he left at the defendant's railroad depot, taking receipts for the same, but gave no orders for its shipment, and the railroad company, without any authority from such agent, shipped the same to Waterville, Maine, where another company—the Maine Central Railroad Company—delivered the same to a person who was not in fact entitled to it. On learning the facts the defendant railroad gave a

CARRIERS.

IN CASE OF CONTINUOUS SHIPMENT OVER SEVERAL LINES. *Continued.*

bill of lading, agreeing to transport the cotton to the person who was entitled to it, in Connecticut, at the consignee's cost and expense, which was not done, the person receiving the cotton refusing to give it up, claiming it was bought for him. The agent drew a draft on his principal, to which he attached the bill of lading, properly assigned, which was paid by the principal, and the latter brought suit against the defendant railroad for the value of the cotton, and recovered. It was contended that the consignee should have sued the Maine Central railroad, and not the defendant: *Held*, that while he might have waived the defendant's contract, and have sued the other company for a conversion, or the person receiving the cotton, he was under no obligation to do so, and that the recovery against the defendant was warranted. *St. Louis and Iron Mountain Railroad Co.* v. *Larned*, 293.

ASSIGNMENT OF BILL OF LADING—ADVERSE POSSESSION.

4. *Estoppel to assert facts that would defeat transfer of property by an assignment of a bill of lading.* While it may be that property in the adverse possession of another is not transferable so as to pass the title, yet where a railroad company gives a bill of lading reciting that the property is then lying in a depot at a certain place, and agrees to forward the same to the consignee, and others advance money on the faith of such bill of lading, which is assigned by the shipper, the railroad company will be estopped, as against such persons, from showing that at the time of giving such bill of lading, and its endorsement, the goods were in the adverse possession of another person, so as to defeat an action brought by the consignee so advancing money on the bill of lading. Ibid. 293.

CARRIERS OF PASSENGERS.

5. *Duty to protect passengers—liability for acts of servant.* See MASTER AND SERVANT, 4, 5, 6.

LIEN OF CARRIER FOR DEMURRAGE.

6. All liens are created by law or by contract of the parties, and when the law gives none, neither party can create one without the consent or agreement of the other. Hence the consignee of goods shipped by railroad is not bound by rules and regulations of the railway company providing for a lien for demurrage, though published, without his or the consignor's assent thereto when the contract for shipping the goods was made. Even a knowledge of such rules, without assent thereto, will not affect the shipper or consignee. *Chicago and Northwestern Railway Co.* v. *Jenkins*, 588.

7. *Presumption as to assent.* The law will never indulge in the presumption of assent to rules of a railway company for a lien for damages caused by delay in receiving the goods shipped, from the publication of the same. Ibid. 588.

CARRIERS. *Continued.*

DEMURRAGE.

8. *Allowable only on maritime contracts.* The right to demurrage does not attach to carriers by railroads. If it exists at all as a legal right, it is confined to the maritime law, and only exists as to carriers by sea-going vessels, and even then it is believed to exist alone by contract. *Chicago and Northwestern Railway Co.* v. *Jenkins*, 588.

CHANCERY.

OF THE BILL.

1. *Construction of a bill as to the character of relief sought.* The deed in which the misdescription occurred, purported to convey five acres off the east side of a certain quarter section, when the intention was to convey that number of acres off the east side of a forty acres of that quarter section. The bill prayed that the deed be corrected according to the facts, and that so far as it applied to the forty-acre tract not intended to be affected, the deed be for naught held, or that the error or mistake be corrected as the court might deem best, and for other and further relief. It was held this prayer in the bill could not be construed as embracing the setting aside of the deed altogether, on the basis of the defendant's answer, and thus to obviate the necessity of a cross-bill. The prayer was for the correction of the deed by a further conveyance, in conformity with the facts charged in the bill. *White et al.* v. *White et al.* 468.

JURISDICTION—REMEDY AT LAW.

2. The general rule, subject to a few exceptions, is, that a court of chancery is prohibited from entertaining jurisdiction in all cases when the plaintiff has a complete and adequate remedy at law. When the court of law has jurisdiction, the complainant must show that his case falls within the exception, to entitle him to relief in equity. *Douglass* v. *Martin et al.* 25.

JURISDICTION—UNDER THE HEAD OF TRUSTS.

3. *And whether a trust exists.* See TRUSTS, 1, 2.

BILL FOR AN ACCOUNT—EMPLOYER AND EMPLOYEE.

4. *To ascertain net profits to determine compensation for services.* Where an employé of a firm is to receive a certain sum per year, and one-half of the net profits of a certain branch of the business, as compensation for his services, a court of chancery will have jurisdiction of a bill by such employé for an account of the partnership, for the purpose of ascertaining the profits of such business, although the complainant is not a partner. *Channon et al.* v. *Stewart*, 541.

CREDITOR'S BILL.

5. *To set aside fraudulent conveyance.* A creditor having no lien must reduce his claim to a judgment before he can maintain a bill in equity to subject property fraudulently conveyed to its payment. If the

CHANCERY. CREDITOR'S BILL. *Continued.*

claim is against an insolvent estate, he must first have it allowed against the estate before he can avoid a fraudulent conveyance,—in other words, he must exhaust his legal remedies. *Scripps et al.* v. *King et al.* 469.

6. Where there has been a fraudulent conveyance to hinder and delay creditors, and a claim against the grantor has been reduced to a judgment, so as to become an equitable lien on the property, a court of chancery may afford relief under section 49 of the Chancery act. Ibid. 469.

7. *As against one holding under a deed which is a mortgage.* Where one having notice that an absolute deed is only a mortgage to secure a debt, procures a deed from the mortgagee, he will occupy the position of assignee of the mortgage, and his title will not be subjected, on creditor's bill, to the payment of a judgment against the mortgagor, when no redemption from the mortgage is sought. The creditor will be required to pay him the mortgage debt before divesting him of his title. *De Clerq et al.* v. *Jackson et al.* 658.

8. *In case of an assignment for the benefit of creditors—chancery will not entertain a creditor's bill—jurisdiction of county court exclusive. Freydendall et al.* v. *Baldwin et al.* 325. See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 2 to 5.

REMOVING CLOUD UPON TITLE.

9. *Requisites of the bill.* Since the act of 1869, a bill to quiet title or remove a cloud from the title to land which fails to show that the complainant is in possession, or that the premises are unoccupied and unimproved, is bad on demurrer, as not showing a case of equitable jurisdiction. *Gage* v. *Griffin*, 41.

10. *Waiver of objection to jurisdiction.* Where a defendant demurs to a bill to set aside a tax deed as a cloud upon title, on the ground it presents no case for the interposition of a court of equity, but declines to answer, even upon being ruled to answer, he will not be held as having waived his objection that there was a want of jurisdiction, on the ground of there being an adequate remedy at law. Ibid. 41.

11. *Reimbursing purchaser at tax sale—effect of illegality of tax.* Upon bill in chancery to remove a cloud upon the title to land, the alleged cloud consisting of a tax deed, the defendant claiming under the tax deed, and who was the purchaser at the sale of the land for taxes, insisted, if his title should be set aside he ought at least to be reimbursed the amount he had paid at the tax sale. The taxes for the non-payment of which the land was sold had been assessed upon personal property in a district in which the property was not liable to the assessment, so there was no obligation on the part of the owner of the land to pay them. Hence the entire proceedings concerning the levy of the tax and the sale of the land therefor were void, and the purchaser at the tax sale was not entitled to be reimbursed the amount he paid at that sale, as a condition

CHANCERY. REMOVING CLOUD UPON TITLE. *Continued.*

to the granting of the relief sought by the bill. Purchasers at tax sales are bound to know at their peril that the supposed delinquent is in truth and in fact a delinquent,—that he has been lawfully assessed, and has failed to make payment. *Wilmerton* v. *Phillips*, 78.

GROUND OF JURISDICTION.

12. *As distinguished from bill to remove a cloud upon title.* To give a court of equity jurisdiction of a bill solely to quiet title, or remove a cloud from the title, the complainant must allege and prove possession of the premises, or that they are unimproved and unoccupied. *Gage* v. *Parker*, 528.

13. But where a bill was originally filed by the owner of land for the purpose of enjoining the execution and delivery of a deed therefor upon an alleged void special assessment, it is not to be regarded as a bill to quiet title or remove a cloud, and does not fall within the rule stated as governing that class of bills. Nor will the character of the jurisdiction in that regard be considered as modified by the filing of a supplemental bill, setting up that the complainant had redeemed from the sale under the alleged void assessment, and that after such redemption the purchaser had taken out a deed, and praying that such deed be set aside and canceled. Ibid. 528.

SETTLEMENT OF ESTATES.

14. *Whether a court of chancery will assume the settlement of an estate.* A court of chancery, on a bill to construe a will and make a partition of the estate devised among the several devisees, will not, after settling the rights of the parties, take the entire settlement of the estate from the probate court, when no sufficient reason therefor is shown. There may be cases when the court would be justified in so doing. *Cowdrey* v. *Hitchcock et al.* 262.

SPECIFIC PERFORMANCE.

15. *Degree of proof of verbal contract.* A specific performance of a verbal contract respecting real estate will not be decreed, except upon clear and conclusive proof of its existence and terms. The proof must be clear and explicit, leaving no room for reasonable doubt, and the contract must be certain, equal and fair. *Wallace* v. *Rappleye et al.* 229.

16. *As to the nature of the contract and the consideration.* To make a contract the basis of a decree for specific performance, it must be certain, fair and just in all its parts, and be founded upon a valuable, as distinguished from a merely good or moral, consideration. Ibid. 229.

17. *Unfairness, to defeat specific performance.* A contract of a putative father with his participant in adulterous intercourse, by which to deprive the injured wife and her lawful children of their rights of inheritance, and bestow them in whole or in part upon the spurious offspring of their adulterous intercourse, will not be specifically enforced by a court of equity, to the prejudice of the father's lawful heirs. Ibid. 229.

CHANCERY. SPECIFIC PERFORMANCE. *Continued.*

18. *Matter of discretion—uncertainty—change of circumstances.* The specific performance of a contract, even when satisfactorily proven, is not a matter of right in the party, but a matter of sound discretion in the court, which grants or withholds relief according to the circumstances of each particular case. The uncertainty of a contract to make one an heir, as to the amount of the party's property to be affected, is a circumstance to be considered by the court in exercising this discretion, and so a change of circumstances in the parties may be considered. *Wallace* v. *Rappleye et al.* 229.

CROSS-BILL.

19. *When necessary.* Affirmative relief can not be granted to a defendant in chancery upon his mere answer to the bill. To obtain such relief the defendant must file a cross-bill praying for the relief he seeks. *White et al.* v. *White et al.* 438.

20. Upon bill filed to reform a deed in respect to an alleged misdescription of the land intended to be conveyed, the defendant answered, admitting the mistake in the description of the land in the deed, but setting up another and different mistake—that it was intended to convey only a life estate in the land, whereas the deed purported to convey the fee. The evidence on the hearing tended strongly to support the answer, and the court below entered a decree setting the deed aside. It was held erroneous to grant such relief to the defendant in the absence of a cross-bill. Ibid. 438.

AFFIRMATIVE RELIEF ON ANSWER.

21. A defendant is not entitled to affirmative relief on his answer alone, when it is not made a cross-bill. To obtain such relief it must be on original or cross-bill. *Smith et al.* v. *West et al.* 332.

AMENDMENT OF BILL—MULTIFARIOUSNESS.

22. After the filing of an original bill to set aside a sale of lots for unpaid special assessments, on the ground that the ordinance under which the assessment was made was illegal and void, a supplemental bill was filed showing a subsequent sale of the same property to the same purchaser, and a redemption from such sales within the time provided by law, but that the purchaser had taken out deeds on the sales, which it prayed to have set aside: *Held*, that the supplemental bill was a mere amendment, and as an amendment was proper, and that the bill as amended was not multifarious, the matters in the two bills not being distinct and unconnected. *Gage* v. *Parker*, 528.

MULTIFARIOUSNESS—REMEDY AT LAW.

23. *Of the time within which to object.* Where a bill in chancery for the foreclosure of a mortgage, also seeks to have removed an alleged cloud upon the title under which the mortgagee claims, the bill disclosing upon its face that the alleged cloud consists of an adverse claim of title independent of and unconnected with that of either the mortgagor or the

CHANCERY. MULTIFARIOUSNESS—REMEDY AT LAW. *Continued.*

mortgagee, an objection that the bill is multifarious because of the two-fold character of relief sought, or because the complainant has an adequate remedy at law in respect of the adverse claim of title, can not be availed of in the first instance in a court of review. *Chicago Theological Seminary* v. *Gage*, 175.

RETAINING BILL FOR FULL RELIEF.

24. *Effect of amending bill.* Where a court of chancery once obtains jurisdiction of a cause on any equitable ground, a subsequent amendment of the bill asking other relief will not deprive the court of jurisdiction to grant complete relief. When the court acquires jurisdiction for one purpose, it may go on and do complete equity between the parties. *Gage* v. *Parker*, 528.

SETTING ASIDE DISMISSAL OF BILL.

25. *How far discretionary.* On sustaining a demurrer to a bill in chancery the court below entered an order dismissing the bill. The complainant, at the same term of court, upon reasons assigned and supported by affidavit, moved the court to set aside the order of dismissal. The motion was denied, and upon questioning the propriety of this ruling, it was held to be within the sound discretion of the chancellor whether he will set aside such an order of dismissal, and there not appearing to have been any abuse of that discretion, the ruling was not subject to review. *Ilett et al.* v. *Collins et al.* 74.

PRESERVING THE EVIDENCE.

26. *Findings must support decree where the evidence is not preserved.* Where the evidence in a chancery suit is not preserved in the record, no presumptions can be indulged in this court as to what the court below found, but the findings must speak for themselves, and if they are not sufficient to sustain the decree, it will be erroneous, and must be reversed. *Carne et al.* v. *Truman*, 321.

27. If there is in such a case a finding of facts sufficient to support the decree, this court will presume the evidence warranted the finding, when it is not preserved in the record. Ibid. 321.

28. Where copies of affidavits filed in the county clerk's office of the purchase of a lot for taxes, and of the service of notice of the time when the redemption will expire, are preserved in the record as exhibits, in a bill to set the tax deed aside as a cloud upon the former owner's title, a finding in the decree of the court that said affidavits are null and void, and not in compliance with the statute, will not preclude this court from examining the exhibits to see if they are void, and not in compliance with the statute. Ibid. 321.

CHANGE OF VENUE. See VENUE, 1, 2.

CLOUD UPON TITLE. See CHANCERY, 9 to 13.

COLLATERAL SECURITY.

PLEDGE OF ACCOMMODATION PAPER.

And payment of the principal debt—of pledging the same a second time. See ACCOMMODATION PAPER, 9.

COMMENCEMENT OF SUIT.

WHAT CONSTITUTES.

1. *As affecting the limitation of actions.* The bringing of a suit is the issuing of a summons or other process to bring the defendant into court. The substitution of the assignee of a bankrupt as plaintiff in a suit, is not to be regarded as the commencement of the suit by the assignee, within the meaning of the United States statute limiting such actions to two years after the assignee's appointment. *Chicago and Northwestern Railway Co.* v. *Jenkins*, 588.

CONSIDERATION.

SUFFICIENCY OF CONSIDERATION.

1. *One good one is sufficient.* Where various considerations are averred and proved, some good and some insufficient, one sufficient one will support the contract. *Ives* v. *McHard*, 97.

2. *Extension of time of payment for guaranty.* The extension of the time of payment of an antecedent debt, is a sufficient consideration to support a contract guarantying its payment. Ibid. 97.

3. *Illicit cohabitation.* An agreement in consideration of future illicit cohabitation between a man and a woman is void, and past cohabitation does not form an adequate consideration for a promise not under seal, even if it does when made under seal. *Wallace* v. *Rappleye et al.* 229.

4. *Of a contract to support illegitimate child, and make it an heir.* A promise by a putative father to support his illegitimate child, may be supported and sanctioned from his legal liability for such support, but there being no legal liability to make such child an heir, a promise or agreement to do so, made with the mother, must have a valuable consideration for its support. In such case the surrender of the child by the mother to the father, to be provided for, being beneficial to the mother rather than detrimental, and an inconvenience to the father, does not constitute a valuable consideration for an agreement of the father to make the child his heir at law. Ibid. 229.

CONSTITUTIONAL LAW.

JURISDICTION OF COUNTY COURTS.

1. *Of the extended jurisdiction of county courts in counties in which probate courts are or may be established—constitutionality of the act of 1881. Klokke* v. *Dodge*, 125. See JURISDICTION, 6, 7.

CONSTITUTIONAL LAW. *Continued.*

RAILROAD BONDS—FOR WHAT PURPOSES TO BE ISSUED.

2. *Constitutional prohibition against issue of bonds or stock, except for money, labor, or property received—and of the rights of innocent holders of railroad bonds. Peoria and Springfield Railroad Co.* v. *Thompson*, 187. See RAILROADS, 1, 2, 3.

LIABILITY OF STOCKHOLDERS.

3. *As to the mode in which it may be fixed—under constitution of 1848. Diversey* v. *Smith*, 378. See CORPORATIONS, 7.

STATE AID FOR IMPROVEMENT OF RIVERS.

4. *Constitutional inhibition as to railroads and canals. People ex rel. Attorney General* v. *The Kankakee River Improvement Co.* 491. See KANKAKEE RIVER IMPROVEMENT COMPANY, 7.

OF THE NUMBER OF WHICH A JURY MAY CONSIST.

5. *Act of 1879, "to aid industrial schools for girls."* See INDUSTRIAL SCHOOLS, 5.

INDUSTRIAL SCHOOLS.

6. *Constitutionality of the same act, as being in restraint of personal liberty.* Same title, 1, 2, 3.

EXEMPTION FROM TAXATION.

7. *As to property of counties—constitutional provision not imperative. Cook County* v. *City of Chicago*, 646. See TAXATION, 2.

IMPOSING LICENSE FEE ON DOGS.

8. *Police power of the State.* See DOGS—LICENSE FEE, 2.

CONSTRUCTION.

CONSTRUCTION OF WILLS. See WILLS, 3.

CONSTRUCTION OF STATUTES. See STATUTES, 3.

CONTINUANCE.

IN MANDAMUS.

1. *For want of service.* It is a sufficient ground for a continuance in a proceeding for *mandamus* in this court, where the action or conduct of several persons is sought to be affected or controlled by the writ, that some of the persons so to be affected have not been served with the summons. *People ex rel.* v. *Thistlewood et al.* 139.

CONTRACTS.

WHAT IS EMBRACED IN THE WORD "CONTRACT."

1. The word "contract" in law embraces not only the agreements of parties actually to do, or refrain from doing, some lawful thing, but also many other legal obligations which the law creates or implies from certain relations of the parties to each other, such as the duty of a husband to support his wife or a parent his child. *Umlauf* v. *Umlauf*, 651.

CONTRACTS. *Continued.*

SALE OF LAND.

2. *As to precedent or contemporaneous acts of the vendor and purchaser, respectively.* Where a written offer to purchase real estate is accepted, the purchaser proposing to pay $35,000 in cash on or before a certain day named, and to assume the payment of a mortgage on the property, possession to be given on the cash payment, and a mortgage to be given on the premises for the deferred payments, the payment of the $35,000 must precede the right of the purchaser to receive a deed, and the execution of such deed must precede or be contemporaneous with the execution of the mortgage to secure the deferred payments. *Papin et al.* v. *Goodrich et al.* 86.

3. *Excuse for non-performance by purchaser—use of insulting language by vendor—inability of vendor to perform.* The use of insulting, disagreeable and irritating language by a vendor of real estate, when approached on the subject of the contract by the purchaser, affords no excuse for any relaxation on the part of the latter or his assignee in preparing and offering to carry out the contract. If the vendor, before the day of payment, has put it out of his power to perform his part of the contract, payment, or an offer to pay unqualifiedly, would, doubtless, be excused. Ibid. 86.

4. *Failure on part of vendor to fix the time for doing an act connected with sale—as excusing tender of payment by purchaser on the day fixed therefor.* In a contract for the sale of a hotel and all the furniture belonging thereto, at a definite and fixed price, an inventory of the furniture to be furnished by the vendor, in which contract a payment is provided to be made on or before a day named, a refusal on the part of the vendor to set a time for taking the inventory affords no excuse for not making the payment at the proper time, or an unqualified tender of the same, as the taking of the inventory could have nothing to do with fixing and making more definite the duties of either party, such as determining the price, or amount of payments. In such case the making of the inventory is merely a separation and identification of the property, and a part of the surrendering of possession. Ibid. 86.

5. *Right of purchaser to inspect deed before paying purchase money.* In the absence of any clause in a contract of purchase of property to that effect, the purchaser will have no right to a personal inspection of the vendor's deed before making the payment upon which he is to receive a conveyance. Ibid. 86.

6. *Proof of custom on that subject.* There is no error in refusing proof of a custom in a particular place to afford a purchaser of land an opportunity to inspect his vendor's deed before making payment, when no offer is made to show that it was uniform, long established, generally acquiesced in, and so well known as to induce the belief that the parties contracted with reference to it. Ibid. 86.

CONTRACTS. SALE OF LAND. *Continued.*

7. *Refusal of vendor to permit purchaser to inspect deed before payment—effect on the rights of the parties.* Where, by a contract, the purchaser of real estate is required on a certain day to make a payment, and the vendor to convey, the purchaser, on the day before the day fixed, offered to make the payment upon inspection of the vendor's deed, if it should prove satisfactory, and the vendor refused to allow an inspection, though stating he had the same prepared ready for delivery on payment, the court say they do not hold the vendor made a sufficient tender of a deed, or manifested such a willingness to comply with his contract as to have authorized him then, on the refusal of the purchaser to perform, to have filed a bill to cancel the contract. *Papin et al.* v. *Goodrich et al.* 86.

8. Under a contract for the sale and conveyance of real estate, the purchaser was to make a payment on or before a day named, when the vendor was to deliver the conveyance. On the day preceding this day, the assignee of the purchaser, having the money necessary, offered to pay it, if, upon inspection of the deed, it should prove satisfactory, which inspection the vendor refused, but offered to deliver the same on deposit of the money with his banker, which the assignee refused to do: *Held*, that neither party was relieved from his obligation under the contract by what then transpired. Ibid. 86.

9. *As to furnishing abstract of title—specific reason for refusal of purchaser to perform.* Where a contract of purchase provides that the vendor is to furnish an abstract of title, and notice is given where such abstract may be found and inspected, the failure of the vendor to furnish the same, when no objection is urged at the time, will not authorize the purchaser to rescind, and his refusal to perform is placed on another ground which is untenable. Ibid. 86.

ILLEGAL CONTRACTS.

10. *Courts will not assist either party to an illegal contract.* The rule is well settled in this State that the court will not assist either party to an illegal transaction in any respect, but will leave them in the position they have voluntarily and knowingly placed themselves. In such case the maxim "*ex turpi causa non oritur actio*," applies. *Workingmen's Banking Co.* v. *Rautenberg, Admx.* 460.

11. *Indebtedness of director of a bank in excess of limit in charter —guaranty.* Where a bank charter contains a clause that no director of the corporation shall be indebted to it, either directly or indirectly, at any time, to an amount greater than seventy-five per cent of the capital stock held by him in good faith as his own, and a director has become indebted to the bank in excess of such sum, a note given by him to the bank for a further sum will be illegal and void, and any guaranty of a third person of its payment, being in aid and furtherance of such illegal contract, will be equally void, and no recovery can be had upon such guaranty, although the guarantor is not a director. Ibid. 460.

CONTRACTS. *Continued.*

RESCISSION OF CONTRACTS.

12. *By the parties—and what amounts to a rescission.* The parties to a contract for the sale of real estate have the right, if they see proper, to cancel and set aside the same; and when the purchaser notifies the vendor, in writing, that he considers himself released from all obligation under the contract, and the vendor immediately gives the vendee notice that he accepts the surrender of the contract, and declares the contract at an end, this will be a valid rescission of the contract of sale, after which no specific performance can be had. *Parmly* v. *Buckley et al.* 115.

HEIRSHIP BY CONTRACT.

13. *In respect to illegitimate child—degree of proof required.* See HEIRS, 1.

14. *Contract as to heirship of legitimate child—without notice of a prior agreement.* Same title, 2.

ACCOMMODATION PAPER.

15. *What constitutes—and of rights in respect thereto.* See ACCOMMODATION PAPER, 1 to 9.

CONVEYANCES.

GRANT OF A FRANCHISE.

1. *Does not carry tangible property.* The tangible property of a corporation does not pass as an incident or accession on the sale of the franchise. *St. Louis Bridge Co.* v. *Curtis et al.* 410.

DESCRIPTION.

2. *Of property conveyed by deed—requisites of a description—and what embraced therein.* See DESCRIPTION, 1 to 4.

TENEMENTS, HEREDITAMENTS AND APPURTENANCES.

3. *To what those words refer in a deed—and what will pass as an appurtenance.* Same title, 5, 6.

DEED BY A MARRIED WOMAN.

4. *Of her separate property—under the law in 1867.* See MARRIED WOMEN, 1, 2.

TRUSTEE'S DEED—CONSTRUED.

5. *As whether showing a sale of several lots, or of only one.* See MORTGAGES AND DEEDS OF TRUST, 9.

CORPORATIONS.

ORGANIZATION OF CORPORATION.

1. *Can not be attacked collaterally.* The legality of the organization of a corporation can be attacked and judicially examined only in a direct proceeding by *quo warranto*. It can not be inquired into in a collateral proceeding, such as a suit by the corporation. *Osborn* v. *The People ex rel. Lewis*, 224.

CORPORATIONS. ORGANIZATION OF CORPORATION. *Continued.*

2. *Evidence under plea of nul tiel corporation.* See PLEADING AND EVIDENCE, 5.

AMENDMENT OF CHARTER.

3. *Whether binding on the company.* Where an amendment of the charter of a private corporation, limiting the time within which a duty already enjoined is to be performed, is accepted by the company, such additional requirement becomes an express condition to the grant of the franchise conferred, which the company must perform to entitle it to a continuance of its franchise. The non-compliance with the requirement will be regarded as *per se* a misuser, and a cause of forfeiture of the franchise as for condition broken. *People ex rel. Attorney General* v. *Kankakee River Improvement Co.* 491.

ACTS ULTRA VIRES—ESTOPPEL.

4. While it is the general principle that negotiable securities issued by a corporation without authority of law, or in express violation of a statute, are inoperative and void even in the hands of innocent holders, yet there is another rule of law equally well settled—that although a contract entered into by the agents or officers of a private corporation is *ultra vires*, and therefore not binding on the company so long as it remains executory, yet if the company in such case knowingly permits the other contracting party, without objection, to go on and perform the contract on his part, and thereby obtains and appropriates to its own use money, property or labor in furtherance of some legitimate corporate purpose, it will be estopped from denying its liability on such contract. *Peoria and Springfield Railroad Co.* v. *Thompson*, 187.

STOCKHOLDERS—LIABILITY.

5. *Priority of right—when not acquired merely by the institution of suit.* The mere institution of a suit at law by one of several creditors of an insolvent bank to enforce the personal liability of a stockholder for the payment of his claim, does not give him a prior right or lien on the fund when collected, to the exclusion of all other creditors of the bank, and the fact that such creditor was prevented from obtaining final judgment in his suit at law by injunction on bill filed by other creditors, after the bringing of the suit at law, can make no difference. Such fund, when collected of the stockholder, under decree in the suits in chancery, is for the benefit of all the creditors who are parties to the suits in equity. In this State it is the final judgment or decree of the court which creates a lien. *City of Chicago et al.* v. *Hall et al.* 342.

6. *Conclusiveness of decree.* Where a suit at law by a creditor of an insolvent bank against a stockholder to enforce his personal liability to creditors, under the bank charter, is enjoined in equity by other creditors of the bank, seeking by bill to have the liability of the stockholders enforced as a fund for the payment of creditors, and the stockholders discharge their liability, as found by the decree of the court under the

CORPORATIONS. STOCKHOLDERS—LIABILITY. *Continued.*

bill, by payment of the sum found against them, and such decree has been affirmed by this court, the decree must stand forever as conclusive of the rights of all persons affected by it, and the fund must be administered by the court on the principles of equity and equal justice, and no priority can be given to the creditor whose suit at law was stayed. *City of Chicago et al.* v. *Hall et al.* 342.

7. *As to the mode in which stockholders' liability may be fixed—under constitution of 1848.* Section 2, art. 10, of the constitution of 1848, not having directed any specific way in which "dues from corporations not possessing banking powers or privileges, shall be secured," and allowing it to be "by such individual liabilities of the corporators as may be prescribed by law," any means provided by the General Assembly for that purpose would seem to meet that requirement, and should the General Assembly determine to secure such dues by individual liabilities of the corporators, there is no restriction or limitation as to the manner in which it shall be done. It may therefore secure such dues by making the corporators liable individually to penalties, as a reasonable and effective mode. *Diversey* v. *Smith*, 378.

8. *Reservation of power in charter, as limiting the mode of fixing liability of stockholders.* A reservation in an amendment to the charter of an insurance company, of the right of the legislature to bring the corporation under the operation of general laws, does not bind the legislature to enact any specific law, and does not operate as a contract with the stockholders that they shall be subjected to any specific additional primary liability on their contracts of subscription. It only gives a discretion to enact such general law as the legislature in its discretion deems best for the public good, and such laws may be penal in their character as to the liability of stockholders. Ibid. 378.

9. *As to the nature of the liability of stockholders, whether arising as a penalty, or upon contract.* Where a statute relating to a corporation declares that it shall not transact business until certain preliminary things have been done, and if it does so transact business in violation of such provision the trustees and corporators shall be liable to the creditors to a given amount, the liability so imposed is a penalty for violating the law, or allowing it to be done. But where the statute declares the corporation may transact business and the stockholders shall be liable for its debts contracted, either absolutely or until some subsequent thing shall be done, their liability is primary, and is based upon a contract. In the other case it is based upon a tort. Ibid. 378.

STOCKHOLDERS OF INSURANCE COMPANIES.

10. *Requirements of the general law of 1869, as preliminary to right to transact business.* Under the general Insurance law of 1869 an insurance company has no authority to commence business and issue policies until after the Auditor of Public Accounts shall have delivered

CORPORATIONS.

STOCKHOLDERS OF INSURANCE COMPANIES. *Continued.*

to it a certified copy of its charter and of the certificates required to be filed with the Auditor, and the company shall have filed them in the office of the proper county clerk for record, and any attempt on its part to do so before this is done is in direct violation of the statute. *Diversey* v. *Smith*, 378.

11. *Nature, character and extent of liability of stockholders in insurance companies—under law of 1869.* The individual liability of a stockholder, under section 16 of the act in force July 1, 1869, entitled "An act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois," is a penalty prescribed for transacting business before the company has complied with the requirements of that act, by having all its stock paid in, and receiving from the Auditor a certified copy of its charter and of the certificates required to be filed, and is in the nature of a punishment for the violation of the provisions of such act. The act creates no primary liability by way of contract between the stockholder and creditors of the corporation for the debts thereof, and hence the right of action given does not survive the death of the stockholder. Ibid. 378.

12. Although an insurance company is prohibited from commencing business and issuing policies before certain things are done which are essential to constitute a license or authority, if in defiance of such prohibition it should commence business and issue policies, as between it and the other contracting party, who has performed his part of the contract and paid his money, the company will be estopped to deny its authority to make the contract, and it will be liable in an action thereon at the suit of the creditor; but such debts are not made by the statute the debts or liabilities of the trustees or corporators. The latter are not made liable jointly and severally with the company. Their liability to the creditors is not for their indebtedness, but for that of the company, as a penalty for allowing it to do business in violation of law. Ibid. 378.

13. The individual liability of a trustee or corporator of an insurance company, under the act of 1869, to creditors of the company, when it has not complied with the law, does not depend upon the fact the creditor has sustained any actual loss or injury by the failure of the trustees or corporators. The creditor is only required to show the company owes him, and that the whole amount of the capital of the company has not been paid in, and a certificate thereof recorded, as provided by the act. Ibid. 378.

14. *Liability for corporate debts—under what law arising.* The 25th section of the charter of the Lamar Insurance Company, on the subject of the individual liability of stockholders in that company for debts of the corporation, is not to be understood as fixing any liability at all, but the entire section is one of limitation or restriction only,—that

CORPORATIONS.

STOCKHOLDERS OF INSURANCE COMPANIES. *Continued.*

is, that the liability of the stockholder can not be extended by subsequent legislation beyond the limit therein prescribed. The liability of the stockholders in that company arises under the 16th section of the general law relating to insurance. *Gridley* v. *Barnes et al.* 211.

15. *Former decision.* Nor is the case of *Arenz* v. *Weir*, 89 Ill. 25, to be understood as laying down any different rule. In that case the question whether section 25 of the charter imposed any such liability was not before the court. That section, together with art. 10 of the constitution of 1848, and the amendment of the charter of 1869, was referred to merely as showing that the legislature retained the constitutional right to impose upon the stockholders the liability as fixed by the 16th section of the general Insurance law. Ibid. 211.

SERVICE OF NOTICE ON CORPORATION.

16. *As to the manner thereof.* See NOTICE, 1.

SERVICE OF PROCESS.

17. *On corporation.* See PROCESS, 2.

CORPORATE SEAL.

18. *Presumption as to right of agent to use same.* See AGENCY, 2.

MUNICIPAL CORPORATIONS.

19. *Of their powers, and in what manner to be exercised.* Municipal corporations are mere creatures of the legislative will, and can exercise no powers except such as the State has conferred on them. All powers they possess are held by them in trust for the people of the municipality, and for the public generally. Their governmental and administrative powers, other than those conferred by statutory or constitutional enactment, which are self-executing, can only be exercised by appropriate ordinances. *Zanone* v. *Mound City*, 552.

20. *Ordinances—their requisites—generally.* See ORDINANCES.

CORPORATE AUTHORITIES.

WEST CHICAGO PARK COMMISSIONERS.

Constitute a quasi municipal corporation. See PARKS, 3.

COUNTIES.

PROPERTY OF A COUNTY—WHETHER TAXABLE.

Constitutional provision. See TAXATION, 2.

COUNTY COURT.

JURISDICTION.

1. *In case of assignment for benefit of creditors—jurisdiction of county court exclusive.* See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 2 to 5.

2. *In cases of misdemeanor.* See JURISDICTION, 1.

COUNTY COURT. *Continued.*

JURISDICTION AS TO PROBATE MATTERS.

3. *In counties in which probate matters have been established.* See JURISDICTION, 3, 4, 5.

EXTENDED JURISDICTION UNDER ACT OF 1881.

4. *Constitutionality of the act.* Same title, 6, 7.

CHANGE OF VENUE TO COUNTY COURT.

5. *From circuit court in misdemeanor.* See VENUE, 1, 2.

CREDITORS.

PRIORITY OF RIGHT.

When not acquired merely by the institution of suit. See LIENS, 2.

CREDITOR'S BILL. See CHANCERY, 5, 6, 7; ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 2 to 5.

CRIMINAL LAW.

COUNTY COURT—JURISDICTION.

1. *Of indictment for misdemeanor.* The county court has jurisdiction to try an indictment for selling spirituous liquor to a minor without having the written consent of his parents, etc., when sent to it by the circuit court in pursuance of an application for a change of venue on account of the prejudice of the circuit judge. *Barr* v. *The People*, 110.

LARCENY.

2. *Possession of stolen goods as evidence of guilt.* Possession of property recently stolen is *prima facie* evidence of guilt, and is sufficient to warrant a conviction for its larceny, unless the attending circumstances or other evidence so far overcome the presumption thus raised as to create a reasonable doubt of the guilt of the accused, when an acquittal should follow. *Smith* v. *The People*, 82.

EVIDENCE IN CRIMINAL CASES.

3. *Admissibility of defendant's affidavit for a continuance on defence of insanity.* On a trial for an assault with intent to murder, when insanity alone is relied on in defence, the assault and shooting not being controverted, it is error to admit in evidence, on behalf of the prosecution, the affidavit of the defendant made for a continuance, in which he denies the act alleged, and his guilt, it being wholly irrelevant to the issue of insanity. *Farrell* v. *The People*, 17.

4. An affidavit of a party for a continuance is competent evidence against him on the trial, when it is relevant to the issue, it standing on the same footing as any other declaration made by him under oath. Ibid. 17.

5. *Evidence showing a different offence, not proper.* On the trial of one for an assault with intent to murder, he can not be punished for perjury in his affidavit for a continuance, and the admission of the affi-

CRIMINAL LAW. EVIDENCE IN CRIMINAL CASES. *Continued.*

davit in evidence for that purpose, or where its only effect is to show his perjury, is error. *Farrell* v. *The People*, 17.

6. *Sufficiency of proof of sale of liquor.* On the trial of one for selling liquor without a license, the testimony of a witness that the defendant at a certain time kept a billiard hall in the place, and sold cider, pop and cigars, but that he did not know whether the defendant sold liquor or not, fails to show any violation of law. *Fisher* v. *The People*, 101.

7. *Sale of liquor by another—proprietorship of defendant to be shown.* The testimony of a witness that at certain times he bought liquor at the defendant's place from one S. while the defendant was absent, without any proof that the defendant was the proprietor of the establishment at the time, will not authorize the conviction of the defendant for such sales. Ibid. 101.

8. *Of evidence to show the time of an occurrence by one who had heard of it.* A witness testified that he had obtained liquor from the defendant several times in the summer and fall of 1878, which was within the period of limitation, and on cross-examination admitted he had had a difficulty at the defendant's place of business, and that defendant ordered him out of his house, but could not exactly remember in what year that occurred, but thought it was in 1876. The defendant called a witness who testified that he knew the former witness, and heard something about he and defendant having a difficulty. This being objected to, the defendant's counsel said: "We propose to show that in the spring of 1877" defendant and the former witness "had a difficulty, and then go further, and show that he was not in defendant's place of business after that." The court, on objection, refused to allow the same to be proven: *Held*, that the court erred in refusing this evidence, as it tended to show that sales were not made within eighteen months before the indictment. Ibid. 101.

CHANGE OF VENUE.

9. *When it may be taken to the county court.* See VENUE, 1, 2.

CURTESY.

WHEN THE ESTATE VESTS.

1. *Since the act of 1861.* Since the Married Woman's act of 1861, the husband's right to an estate by the curtesy in the lands of his wife is contingent, and does not vest in the husband until after the death of the wife. *Lucas* v. *Lucas*, 121.

CUSTOM.

WHEN IT MAY BE SHOWN.

1. *Right of purchaser of land to inspect deed.* There is no error in refusing proof of a custom in a particular place to afford a purchaser of land an opportunity to inspect his vendor's deed before making pay-

CUSTOM. WHEN IT MAY BE SHOWN. *Continued.*

ment, when no offer is made to show that it was uniform, long established, generally acquiesced in, and so well known as to induce the belief that the parties contracted with reference to it. *Papin et al.* v. *Goodrich et al.* 86.

DEATH.

PRESUMPTION. See PRESUMPTION, 1.

DEATH OF DEFENDANT.

WHETHER CAUSE OF ACTION SURVIVES.

1. *In an action to recover a statutory penalty.* See ACTIONS, 5.

LEVY AND SALE ON EXECUTION.

2. *After the death of the defendant in the judgment.* See SALES, 1, 2, 3.

DECREE.

DECREE CONSTRUED.

1. *As to whether for payment of certain pledged bonds.* A decree for the foreclosure of a railroad mortgage securing bonds of the company, found the sum due on twenty-eight bonds pledged by the company as collateral security for a debt of the company, which debt was also secured by a deed of trust, and ordered sale of the property, subject to the trust deed, for the whole sum found due on all the bonds, and that the bonds so pledged, or the judgment thereon in the foreclosure suit, and the personal property pledged, should be surrendered: *Held*, that the latter part of the decree neutralized the portion of it for the payment of the twenty-eight bonds, and, taken together, was no decree for their payment. *Galena and Southern Wisconsin Railroad Co.* v. *Stahl*, 67.

CONCLUSIVENESS OF DECREE.

2. *On the parties.* Where a suit at law by a creditor of an insolvent bank against a stockholder to enforce his personal liability to creditors, under the bank charter, is enjoined in equity by other creditors of the bank, seeking by bill to have the liability of the stockholders enforced as a fund for the payment of creditors, and the stockholders discharge their liability, as found by the decree of the court under the bill, by payment of the sum found against them, and such decree has been affirmed by this court, the decree must stand forever as conclusive of the rights of all persons affected by it, and the fund must be administered by the court on the principles of equity and equal justice, and no priority can be given to the creditor whose suit at law was stayed. *City of Chicago et al.* v. *Hall et al.* 342.

DEDICATION.

FOR STREETS.

What becomes of the fee. See HIGHWAYS, 1.

DEMURRAGE.

ALLOWABLE ONLY ON MARITIME CONTRACTS.

Not to carriers by railroad. See CARRIERS, 8.

DEMURRER.

STATUTE OF LIMITATIONS—OR LACHES.

When availed of on demurrer. See LIMITATIONS, 16, 17.

DESCENTS.

HEIRSHIP BY CONTRACT. See HEIRS, 1, 2.

DESCRIPTION.

OF PROPERTY CONVEYED BY DEED.

1. *Requisites of the description—and what will pass thereby.* It is a rule of uniform application that to pass a thing granted it must be embraced in a general or specific description, and the description must be such as to distinguish it from all other things. The property may be identified by extraneous evidence, but the description in the grant can not be enlarged or restricted by such evidence. Where there is a general and a specific description, the latter must control. *St. Louis Bridge Co.* v. *Curtis et al.* 410.

2. Effect must be given to a deed according to the intention of the parties, as ascertained from the language they have used; but it is a well established rule of construction that when the description of the property intended to be conveyed includes several particulars, all of which are necessary to ascertain the land to be conveyed, no land will pass except such as will agree with the description in every particular. Ibid. 410.

3. Thus, where a deed describes the premises conveyed as a certain bridge, by its name, then in course of construction, together with the approaches thereto on both sides of the river, and being a strip fifty feet in width, describing such strip, together with all franchises and privileges held by the grantor company by its charter, the grant will be confined to the bridge itself, the approaches thereto, and the company's franchises and privileges, and all other property owned by the grantor will be excluded, and will not pass. Ibid. 410.

4. A deed of trust by a bridge company described the property conveyed as the bridge named, "and also all and singular such pieces or parcels of land occupied by the railway track, culverts, bridges, trestles and other structures thereon, of such bridge company, as now are or hereafter shall be acquired by said party of the first part, for the purpose of laying thereon railway tracks, to connect or make junction between the railway tracks on said bridge and the railway track or tracks of any other corporation or corporations, person or persons, in or about East St. Louis, together with all and singular the tenements, hereditaments and appurtenances to several lots, strips, pieces and parcels of land belonging

DESCRIPTION. OF PROPERTY CONVEYED BY DEED. *Continued.*

or of right appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all rights of way, easements, licenses and claims to or for the use and occupation of the same, and also all the estate, right, title, interest, property, possession, claims and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the above described premises, and every part and parcel thereof, with the appurtenances:" *Held*, that this description did not embrace land and lots of the bridge company not at the time or since occupied for the purposes named in the deed, or appropriated to such purposes then or since. *St. Louis Bridge Co.* v. *Curtis et al.* 410.

5. *Of the words "tenements, hereditaments and appurtenances."* In such a conveyance the words "tenements, hereditaments and appurtenances," apply to the property previously described, and not to property not before enumerated, and the same is true of the reversions, remainders, rents, issues and profits, which words are expressly confined to the property before described. Ibid. 410.

6. *What passes as an appurtenance.* One piece of land held in fee, or by a lesser title, can not be appurtenant to another tract. Nothing can properly be appendant or appurtenant to anything, unless the principal or superior thing be of perpetual subsistence and continuance. An incorporeal hereditament or an easement may be an appurtenance, and pass as such by a grant of the principal to which it is appurtenant. Ibid. 410.

DISCRETION.

SETTING ASIDE ORDER OF DISMISSAL.

In chancery—how far discretionary. See CHANCERY, 25.

DISMISSAL OF SUIT AT LAW.

AFTER DISSOLUTION OF INJUNCTION.

Sufficiency of grounds for dismissal. See INJUNCTIONS, 3.

DIVORCE AND ALIMONY.

EXTREME AND REPEATED CRUELTY.

1. *As a ground for divorce.* It is difficult to define with precision what is and what is not extreme and repeated cruelty. The same act is not the same thing under all circumstances and to all persons. Necessarily each case must, to a large degree, be judged by itself. *Ward* v. *Ward*, 477.

2. As extreme and protracted suffering may be produced primarily by operating on the mind alone, threats of physical violence, and false charges of adultery, by a husband against his wife to her face, maliciously made, are competent evidence to prove cruelty, on a bill for divorce, and

DIVORCE AND ALIMONY.

EXTREME AND REPEATED CRUELTY. *Continued.*

when they are accompanied or followed by acts of actual malicious physical violence, they seem to magnify the atrocity of the acts. *Ward* v. *Ward*, 477.

3. It seems that any willful misconduct of a husband which endangers the life or health of his wife,—which exposes her to bodily hazard and intolerable hardship, and renders cohabitation unsafe,—is extreme cruelty. To amount to such cruelty it is not necessary there should be many acts, and whenever force and violence, preceded by deliberate insult and abuse, have been once wantonly and without provocation used, the wife can hardly be considered safe. Ibid. 477.

4. On the trial of a bill for divorce brought by a wife, the proof showed four or five distinct assaults and batteries upon her by the husband, apparently without provocation, and in addition falsely charging her with a want of chastity, and almost constant insult and abuse within a period of three years, terminating in their separation: *Held*, that the facts authorized a decree of divorce. Ibid. 477.

LIEN OF DECREE FOR ALIMONY.

5. *As to lands in a different county.* *Sapp* v. *Wightman*, 150, and *Yackle* v. *Wightman*, 169. See LIENS, 3 to 6.

DOGS—LICENSE FEE.

LICENSE FEE ON DOGS.

1. *Not a tax.* The license fee imposed on the owners of dogs, under the act of 1879, entitled "An act to indemnify the owners of sheep in cases of damage committed by dogs," is in no sense a tax, and is therefore not within the constitutional provision that all needful revenue shall be raised by levying a tax by valuation. Such fee is imposed under the police power, and not under the taxing power of the State. *Cole et al.* v. *Hall*, 30.

POLICE POWER OF THE STATE.

2. *As to imposing license fee upon dogs.* Everything hurtful to the public interest is subject to the police power of the State, and may be brought within restraining and prohibiting influence. Therefore the act authorizing a license fee to be imposed upon and collected of the owners or keepers of dogs is not subject to any constitutional objection. Ibid. 30.

EASEMENT.

WHAT CONSTITUTES AN EASEMENT.

1. An easement can only consist of the privilege upon or in the land of another, such as a right of way and the like. From its nature a person can never have an easement in his own land. *St. Louis Bridge Co.* v. *Curtis et al.* 410.

EJECTMENT.

NEW TRIAL—UNDER THE STATUTE.

Statute applies only to the trial courts. See NEW TRIALS, 5.

EMINENT DOMAIN.

CONDEMNATION PROCEEDINGS IN VACATION.

1. Under the statute relating to eminent domain, the circuit and county courts are always open for proceedings to condemn land for right of way, and when the summons is quashed the court may order an *alias* summons returnable in vacation, and when so issued and served ten days before the return day, the court will acquire jurisdiction to assess the compensation to be paid for the right of way. *Leibengut* v. *Louisville, New Albany and St. Louis Railway Co.* 431.

OF THE SUMMONS.

2. *How to be made returnable.* Where a summons issued by the county court on an application to condemn land for right of way was made returnable before the county court on a day in vacation, and the court caused the same to be amended so as to read "returnable before the judge," instead of the court, but it was properly served as issued, it was *held*, that the amendment should not have been made, it having been properly made returnable in the first instance; but it was further *held*, that as the amendment worked no harm, it presented no ground to reverse the judgment of the court. A summons in such case, returnable before a judge in vacation, means before the court of which he is judge. Ibid. 431.

CONDEMNATION FOR TELEGRAPH PURPOSES.

3. *Of the rights acquired thereby.* A telegraph company, by a judgment condemning land for its use under the Eminent Domain act, does not acquire the fee to the land, or the right to use it for any other purpose than to erect telegraph poles and suspend wires upon them, and maintain and repair the same, and use the structure for telegraph purposes. This, of course, gives the company the right, at all times, when necessary to construct or to repair the line, to enter upon the strip condemned, doing as little damage as possible. The company can not cultivate such strip, or take exclusive possession of it, or enjoy it for any other purpose. The only exclusive right of occupancy the company acquires is the ground occupied by the poles erected for telegraph purposes. *Lockie* v. *The Mutual Union Telegraph Co.* 401.

4. *Width of strip that may be acquired.* The statute does not designate the width of the strip of land that may be condemned for telegraph purposes, but only authorizes such companies to acquire such an amount of land as may be necessary; and where only one line of poles is specified in the petition, and the evidence does not show that a half a rod in width is an unreasonable amount of land, the judgment condemning that much of the land will be sustained, and will be construed to authorize the erection of but one set of poles. Ibid. 401.

EMINENT DOMAIN.

CONDEMNATION FOR TELEGRAPH PURPOSES. *Continued.*

5. *Of the proper damages.* A telegraph company sought to condemn a strip of land eighteen inches wide and three feet deep every one hundred and fifty feet from the point of beginning, etc., of sufficient width to erect telegraph poles and fixtures thereon, the poles to be set along the line of the right of way of a railroad which was fenced, and the proof showed there would be eleven poles on defendant's land, which was worth $60 per acre. Three witnesses for the defendant testified that the damages would be $10 a pole, arising from their interfering with the use of farming implements, while three witnesses for the petitioner testified, one that fifty cents, and the other two that one dollar a pole, would be full compensation, and that when the poles pursued the line of the right of way of a railroad company, as in this case, in their judgment there could be no other damage than the value of the land taken. It also appeared that a strip of land six feet wide across the whole tract would be two-tenths of an acre, of the value of $12, at $60 an acre, and such a strip eighteen feet wide would be but six-tenths of an acre, and worth but $36. The jury, by their verdict, gave the defendant $38.50: *Held*, that the verdict was manifestly too high, and for this error the judgment was reversed. *Mutual Union Telegraph Co.* v. *Katkamp*, 420.

WEST CHICAGO PARK COMMISSIONERS.

6. *Of their power to condemn land—and of the manner of doing so.* See PARKS, 1, 2, 3.

EQUITABLE DEFENCES.

INNOCENT HOLDERS OF NEGOTIABLE SECURITIES.

1. *Holders of railroad coupon bonds secured by deed of trust—whether subject to equitable defences—application of the doctrine of Olds* v. *Cummings*, 31 Ill. 188, and *Chicago, Danville and Vincennes Railway Co.* v. *Loewenthal*, 93 Ill. 433. *Peoria and Springfield Railroad Co.* v. *Thompson*, 187. See ASSIGNMENT, 1 to 4.

ESTOPPEL.

CARRIER OF GOODS.

1. *Estopped to assert facts that would defeat a transfer of property by an assignment of a bill of lading.* See CARRIERS, 4.

ACTS OF CORPORATION ULTRA VIRES.

2. *When corporation is estopped to deny its liability.* See CORPORATIONS, 4.

TOWN PLAT—ACKNOWLEDGMENT BY AGENT.

3. *Estoppel as against owner, by sale of lots—as to existence of streets.* See HIGHWAYS, 2.

EVIDENCE.

JUDICIAL NOTICE.

1. *As to location of incorporated town—counties under township organization.* This court will take judicial notice of the county in which an incorporated town is situated, and of the fact whether such county is under township organization. *People, use of Town of Highland* v. *Suppiger et al.* 434.

PAROL EVIDENCE.

2. *As to action of a court of record, not proper.* The county court being a court of record, having a seal and a clerk, its proceedings can only be shown by its record. Hence parol evidence that the court approved of the security taken by a guardian for moneys of his ward loaned, is not admissible in a suit upon a guardian's bond. If an order of approval was in fact made, but not recorded, the only remedy is by an application to that court, in apt time, upon notice and proper proof, to have its record amended or completed. *McIntyre* v. *The People, use, etc.* 142.

SECONDARY EVIDENCE.

3. *Abstracts of title where deeds and records are destroyed.* Where original deeds, as well as the record books in which they were recorded, have been destroyed by fire, and neither party is able to produce copies of such deeds, resort may be had to secondary evidence to prove their contents, and by the act of 1872, in relation to lost or destroyed records of conveyances, abstracts of title made by persons engaged in abstracting titles, are made evidence in all courts of law or equity, and may be received to prove the contents of such deeds. *Miller et al.* v. *Shaw et al.* 277.

ADMISSIONS.

4. *Asserting title under trust deed—admission thereby.* If a party procures a conveyance of real estate from one whose title is derived from a sale of the premises under a trust deed, and asserts title thereunder, that is an admission that the foreclosure of the trust deed and the trustee's deed to the purchaser were regular and effective to pass the estate of the grantor in the trust deed. Ibid. 277.

OPINIONS OF WITNESSES.

5. *As to speed of railway train.* In an action for personal injury from being run over by a railway train, where the question of the speed of the train is involved, opinions of witnesses may be received as to that fact. *Chicago, Burlington and Quincy Railroad Co.* v. *Johnson, Admr.* 512.

6. *To prove title or want of title to land.* The want of title in a person can not be proved by verbal testimony. To prove title, or the want of title, the best evidence must be produced, or its absence properly accounted for to admit secondary evidence. The opinions of witnesses are not competent to prove that a person is not a land owner. *Osborn* v. *The People ex rel. Lewis*, 224.

EVIDENCE. *Continued.*

RECITALS IN A TRUSTEE'S DEED.

7. *As evidence of facts recited.* Where a trustee assumes to sell land under a power in a deed of trust, the recitals in his deed are made by statute evidence of the facts so recited therein. *Miller et al.* v. *Shaw et al.* 277.

AS TO CONTENTS OF A LETTER.

8. *Written by the witness.* On the trial of a suit for a divorce brought by a wife against her husband, her brother was called by her as a witness, and on the cross-examination the court refused to allow him to testify to the contents of a letter written by him to the defendant, though he was allowed to state the facts he knew and the state of his feelings: *Held*, no error in the ruling. *Ward* v. *Ward*, 477.

IN ACTION FOR PERSONAL INJURY FROM NEGLIGENCE.

9. *As, for injury from defective sidewalk—evidence in rebuttal, as to previous physical condition of the plaintiff.* In an action against a village to recover damages for injuries from the falling of a sidewalk, the plaintiff claiming that he received an injury in his back, the defendant introduced evidence of a previous complaint on his part of weakness in the back. In answer to this, witnesses on the part of the plaintiff were allowed to testify to their not having heard any complaint by him in regard to his back previous to the accident: *Held*, that though of a negative character, and entitled to but little, if any, weight, it was not irrelevant. *Village of Warren* v. *Wright*, 298.

10. *As explanatory of plaintiff continuing a journey after he was injured.* A party, after receiving a personal injury from a defective sidewalk in this State, went to Canada, where his deposition was taken in a suit by him to recover damages. In the cross-examination he was asked if he stopped over at any place on his return to Canada, and answered that he did not, and then said in explanation that a physician on the train advised him not to stop off over night, but to get home as soon as he could: *Held*, that in rebuttal of the inference as to his physical condition, which might be drawn from the fact of his being able to go through to Canada without any stopping, it was proper for him to give his reason for not stopping over. Ibid. 298.

11. *As to physical condition of plaintiff a year before receiving a personal injury.* Where a plaintiff left Canada to go to the village of Warren, in this State, in March, 1876, and there received a personal injury in May, 1877, by the falling of a sidewalk, in a suit by him against the village, evidence on the part of the plaintiff as to his good physical condition when he left Canada was objected to as too remote: *Held*, that as there was testimony on the part of the defendant as to the poor health of the plaintiff but a short time after his coming to Warren, the objection was without force. Ibid. 298.

EVIDENCE. *Continued.*

AS TO PECUNIARY CIRCUMSTANCES OF PARTIES.

12. *In a suit to recover damages for the death of a person* caused by the alleged negligence of the defendant, it is technically erroneous to admit evidence that the family of the deceased were entirely dependent on his labor for support, though in the particular case the admission of such evidence was not considered as doing any harm. *Chicago, Burlington and Quincy Railroad Co.* v. *Johnson, Admr.* 512.

AS TO APPLICATION OF PAYMENTS.

13. *Indorsement of the payment by the creditor.* Where the maker of a note in a suit thereon testified that in making a payment he directed it to be applied on the note, and the plaintiff that it was made to be applied on an account, it was *held*, error to allow the plaintiff to give in evidence to the jury a copy of the account with his indorsement of the credit thereon, made of his own motion, without the privity of the maker of the note or his surety, and to allow the jury to take such account and indorsement with them on their retirement. The entry of a payment on an account by a creditor instead of on a note of the person paying, is of itself no evidence of any authority to make such application. *Craig* v. *Miller*, 605.

PROOF OF REDEMPTION FROM TAX SALE.

14. *The book of tax sales and redemptions* which the county clerk is required to keep, and in which to enter all sales for taxes, the quantity sold, name of purchaser, etc., and the name of the person redeeming, the date and amount of the redemption money, is competent evidence of the facts therein entered, and of a redemption appearing therein. *Gage* v. *Parker*, 528.

PROOF OF OWNERSHIP OF LAND.

15. *Sufficiency.* While a complainant must prove every material allegation of his bill which is denied, yet when his ownership of lots, in respect of which relief is sought, is not a mooted question, his testimony that he purchased the property originally with his own money from C D, in connection with the deed made to him by C D, may be regarded as sufficient proof of ownership. Ibid. 528.

16. *By paying taxes in former owner's name.* Where a person claimed to have purchased a tract of land from a non-resident owner, for whom he was agent in respect to a large number of other tracts, the alleged purchase being a verbal one, and during a period of thirty years afterward, in paying taxes as agent on his principal's other lands, he included his own tract in his principal's list of lands, but there was no proof that he ever charged the taxes on his tract to the principal in any of their settlements: *Held*, that this was likely a mistake, and the facts did not afford sufficient evidence to show that his claim to the tract alleged to have been bought, was unfounded. *Smith et al.* v. *West et al.* 332.

EVIDENCE. *Continued.*

TO FIX DATE OF A TRANSACTION.

17. It is a well known rule of evidence, that as a means of fixing the date of a given transaction, it may be proven by a witness that at a given time he heard of the occurrence. *Fisher* v. *The People*, 101.

AFFIDAVIT FOR CONTINUANCE.

18. *Whether admissible as evidence.* An affidavit of a party for a continuance is competent evidence against him on the trial, when it is relevant to the issue, it standing on the same footing as any other declaration made by him under oath. *Farrell* v. *The People*, 17. See CRIMINAL LAW, 3, 4, 5.

SUPPRESSING OR FABRICATING EVIDENCE.

19. *Or attempting to influence a witness.* On the trial of a case it may be shown that a party has destroyed or suppressed material evidence, or has fabricated such evidence, as it implies an admission that he has no right to recover if the case is tried on the evidence as it exists. *Chicago City Railway Co.* v. *McMahon*, 485.

20. On the trial of an action on the case, brought against a city railway company to recover for a personal injury, the court allowed a witness for the plaintiff to testify that a clerk in the employ of the defendant offered him $300, either to prevent him from appearing as a witness against the company, or to influence his evidence in favor of the company. This was objected to as no part of the *res gestæ: Held*, that the evidence was proper, though not a part of the *res gestæ*. Ibid. 485.

QUESTIONING JUDICIAL PROCEEDINGS COLLATERALLY.

21. *As to confirmation of special assessment.* A party by suffering judgment of confirmation of a special assessment upon his property by a court of record, is estopped in a collateral proceeding from showing the illegality of such assessment by reason of the insufficiency of the ordinance on which it is based. *Gage* v. *Parker*, 528.

ON CROSS-EXAMINATION.

22. *As to enmity of witness towards the party against whom he had testified.* On the cross-examination of one of the plaintiff's witnesses, he was asked if there had not been a feud or quarrel between his family and one of the defendant's family, which, on objection, was disallowed, the court remarking to counsel that they might inquire as to the witness' own feelings. The witness had already stated that he had not spoken a word to such defendant since he was a little boy, though his feelings toward him were perfectly friendly: *Held*, that while under the latitude of cross-examination it would not have been improper to allow the question, there was no such error in disallowing it as to call for a reversal. The witness had already stated enough to show the relations between the parties, and that was all the excluded question could have properly elicited. *Schmidt et al.* v. *Sinnott*, 160.

EVIDENCE. *Continued.*

BURDEN OF PROOF.

23. *To establish usury.* The burden of proving a transaction usurious, rests upon the party alleging it. The usury must be established by a preponderance of evidence, or else the defence fails. *Kihlholz* v. *Wolf, Ex'x.* 362.

EVIDENCE IN CRIMINAL CASES. See CRIMINAL LAW, 3 to 8.

EXCEPTIONS AND BILLS OF EXCEPTIONS.

BILL OF EXCEPTIONS.

1. *Whether necessary—presumption in support of judgment.* If a plaintiff wishes to assign for error the dismissal of his suit on motion, he should present the ground on which the court acted in a bill of exceptions, so that the error, if any, may clearly appear from the record. Where no reasons are assigned for a motion to dismiss a suit, nor any given which led the court to its action, it will be presumed that the dismissal was correct. *Blair* v. *Ray et al.* 615.

EXEMPTION.

FROM TAXATION. See TAXATION, 2, 3.

FORECLOSURE. See MORTGAGES AND DEEDS OF TRUST, 1, 2; GARNISHMENT, 2.

FORFEITURE OF FRANCHISE.

FOR NON-USER.

And of a partial forfeiture. See KANKAKEE RIVER IMPROVEMENT COMPANY, 3, 4, 8.

FORMER ADJUDICATION.

WHETHER A BAR TO RELIEF.

1. *Or to relief on new ground.* Where the same matters involved in a suit in equity were involved in a prior suit, though in the United States Circuit Court, and the two suits were between the same parties, the decision in the prior suit will be conclusive on the trial of the second suit brought in the State court. *Ruegger et al.* v. *Indianapolis and St. Louis Railroad Co.* 449.

2. Where a suit is brought in the United States Circuit Court to enjoin the collection of a certain tax for certain years, which relief is denied on a final hearing on the merits, and the bill dismissed, this will be a bar to a bill filed by the same complainant against the collectors of the same counties, seeking the same identical relief, although other reasons and grounds may be alleged in the second suit for granting the same. A prior adjudication between the same parties is conclusive upon

FORMER ADJUDICATION. WHETHER A BAR TO RELIEF. *Continued.*

them, not only as to the matters actually determined, but as to every other thing within the knowledge of the parties which might have been set up as a ground for relief or defence. *Ruegger et al.* v. *Indianapolis and St. Louis Railroad Co.* 449.

FORMER DECISIONS.

EQUITABLE DEFENCES—INNOCENT HOLDERS.

1. *Holder of negotiable paper secured by mortgage—how far subject to equitable defences.* As to application of the doctrine of *Olds* v. *Cummings*, 31 Ill. 188, and *Chicago, Danville and Vincennes Railway Co.* v. *Loewenthal*, 93 Ill. 433, to deeds of trust given to secure railroad coupon bonds. *Peoria and Springfield Railroad Co.* v. *Thompson*, 187. See ASSIGNMENT, 1 to 4.

FORECLOSURE—DETERMINING ADVERSE TITLES.

2. *As to the scope and effect to be given to Gage* v. *Perry*, 93 Ill. 176, *in respect to determining adverse legal titles on bill to foreclose a mortgage. Chicago Theological Seminary* v. *Gage*, 175. See MORTGAGES AND DEEDS OF TRUST, 1.

USE OF "DUE AND PROPER CARE"—INSTRUCTION.

3. *Whether submitting a question of law.* An instruction in an action for a personal injury growing out of the alleged negligence of the defendant, which submits to the jury the question whether the plaintiff, at the time of the injury, was exercising "*due and proper care*," is not open to the objection that it submits a question of law to the jury. If some of the expressions used in the case of *Stratton* v. *Central City Horse Railway Co.* are in conflict with this view, they must be regarded as modified accordingly. *Schmidt et al.* v. *Sinnott*, 160. See NEGLIGENCE, 1 to 6.

LIMITATIONS.

4. *Effect of saving clause in acts repealing certain statutes of limitation—former decision.* The 14th section of the Statute of Limitations referred to is a part of the act approved April 4, 1872, and the 24th section of the same act (which repeals certain former acts of limitation) contains a saving clause, that "this section shall not be construed so as to affect any rights or liabilities or any causes of action that may have accrued before this act shall take effect." A cause of action arising under section 16 of the general Insurance law was not embraced in any of the statutes repealed by the 24th section. Prior to 1872 there was no general Limitation law in cases of actions for statutory penalties. So such causes of action are in no way affected by that saving clause. In the case of *Dickson* v. *Chicago, Burlington and Quincy R. R. Co.* 77 Ill. 331, the saving clause in section 24 of the Limitation act of 1872 was construed as if the words "this act" had been used instead of the words "this section." This construction was given in respect to a cause

FORMER DECISIONS. LIMITATIONS. *Continued.*

of action embraced in the Limitation act of 1849, but the saving clause so construed does not affect causes of action not embraced in the statutes repealed by the 24th section. The 14th section will still be given effect as to preëxisting causes of action for a statutory penalty. *Gridley* v. *Barnes et al.* 211.

ROAD TAX—"ROAD AND BRIDGE TAX."

5. *How to be applied,* respectively, under the act of 1879—the case of *Baird* v. *The People*, 83 Ill. 387, on the subject not applicable since the revision of the Road law in 1879. *People, use of Town of Highland* v. *Suppiger et al.* 434. See TAXATION, 4 to 7.

STOCKHOLDERS.

6. *In insurance companies—liability for corporate debts—under what law arising.* The 25th section of the charter of the Lamar Insurance Company, on the subject of the individual liability of stockholders in that company for debts of the corporation, is not to be understood as fixing any liability at all, but the entire section is one of limitation or restriction only,—that is, that the liability of the stockholder can not be extended by subsequent legislation beyond the limit therein prescribed. The liability of the stockholders in that company arises under the 16th section of the general law relating to insurance. Nor is the case of *Arenz* v. *Weir*, 89 Ill. 25, to be understood as laying down any different rule. In that case the question whether section 25 of the charter imposed any such liability was not before the court. That section, together with art. 10 of the constitution of 1848, and the amendment of the charter of 1869, was referred to merely as showing that the legislature retained the constitutional right to impose upon the stockholders the liability as fixed by the 16th section of the general Insurance law. *Gridley* v. *Barnes et al.* 211.

FORMER RECOVERY.

OF ENTIRE AND SEPARATE DEMANDS.

1. *As, principal and interest.* Where a promissory note, running, according to the face of it, for several years, provides that the interest shall be payable annually, and "if the interest is not so paid the entire principal sum shall immediately become due and payable," the omission to pay the interest for a given year will not operate to render the annual interest thus accrued and unpaid, together with the principal sum, an entire demand, in any such sense as will preclude a recovery for each year's interest as it shall accrue, in successive suits therefor. *Wehrly* v. *Morfoot*, 183.

2. So where a recovery was had for one year's interest, under such a contract, it was held the judgment so recovered would not operate as a bar to a subsequent suit for the interest which had accrued in the succeeding year. Ibid. 183.

FORMER RECOVERY. OF ENTIRE AND SEPARATE DEMANDS. *Continued.*

3. Of course, if the prior action had been brought for the principal sum, and the interest which had accrued up to a particular date, then the recovery therein would bar any further suit upon the note, although it was for less than the amount actually due. *Wehrly* v. *Morfoot*, 183.

FRANCHISE.

GRANT OF A FRANCHISE.

1. *Does not carry tangible property.* See CONVEYANCES, 1.

WHETHER FRANCHISE INVOLVED.

2. *In suit to wind up affairs of a corporation, and to dissolve the same.* See APPEALS AND WRITS OF ERROR, 4.

FORFEITURE FOR ABUSE OR NON-USER.

3. *And of a partial forfeiture—further, as to the exercise of a discretion whether there shall be a judgment of ouster, or only a fine imposed.* See KANKAKEE RIVER IMPROVEMENT COMPANY, 3, 4, 5.

LESSEE OF FRANCHISE—IN PART.

4. *Effect of acts of forfeiture as to other parts.* Same title, 8.

FRAUDULENT CONVEYANCES.

SETTLEMENT BY HUSBAND ON HIS WIFE.

1. A husband in failing circumstances had conveyed sixty acres of land, including his homestead, in satisfaction of prior loans of his wife to him of $1700, and being pressed by his creditors he procured a loan of $3000 on the land, and the wife gave up her conveyance, and joined in the mortgage to secure such loan, releasing her dower, in consideration that her husband would settle upon her twenty-three acres of the land, including their homestead, agreeing to sign any other deed or mortgage her husband might make to settle with his creditors. The husband, in pursuance of such arrangement, conveyed to her the tract of twenty-three acres, and it appeared that his indebtedness to her was ample consideration for the property conveyed to her above the amount of the homestead exemption: *Held*, that the conveyance to the wife was upon a sufficient consideration, and valid against the creditors of her husband. *Payne et al.* v. *Miller et al.* 442.

2. A husband, though in failing circumstances, may make a conveyance to his wife, when it is made upon a full and fair consideration; and when such conveyances are made in good faith, they will be sustained to the extent of the consideration actually paid, and no further. Ibid. 442.

AS TO SUBSEQUENT CREDITORS.

3. *A voluntary conveyance* by a husband and wife to a party who immediately reconveys to the wife, can not be impeached as fraudulent as against subsequent creditors of the husband, when there is no evi-

FRAUDULENT CONVEYANCES.

AS TO SUBSEQUENT CREDITORS. *Continued.*

dence that the conveyance was colorable, merely, and that a secret trust and confidence existed for the benefit of the husband, or that the deeds were made in anticipation of incurring debts to avoid which the conveyances were made. *Lucas* v. *Lucas*, 121.

4. *Voluntary conveyance not rendered bad by attempting to prove consideration.* An attempt on a creditor's bill to prove a valuable consideration for a conveyance of land, and failure to establish it, will not deprive the grantee of the right to claim its benefit as a voluntary conveyance without fraud. Ibid. 121.

FREEHOLD.

WHETHER A FREEHOLD INVOLVED.

As affecting the right of appeal. See APPEALS AND WRITS OF ERROR, 5, 6, 7.

GARNISHMENT.

WHAT SUBJECT THERETO.

1. *As to debtor's obligations given in pledge, and afterwards surrendered to him.* Railroad bonds of a railway company, not sold and negotiated, but merely pledged by it as collateral security, when discharged and surrendered are not property of the company liable to be reached by garnishment against an officer of the company receipting for the same, but who in fact never received them. *Galena and Southern Wisconsin Railroad Co.* v. *Stahl*, 67.

2. *Whether property interest passed on sale under foreclosure, as to bonds given in pledge.* Where a railway company pledged twenty-eight of its bonds as collateral security for a bank debt, which were included in a subsequent foreclosure decree in a suit for and in behalf of all the bondholders, and a committee of certain holders of the bonds purchased the property, for the costs of the suit, for the benefit of the bondholders contributing towards the payment of the costs, not including the company to whom the twenty-eight bonds had been surrendered by the bank, and upon which bonds no assessment was paid, and a new company was formed by the persons interested in the purchase: *Held*, that the original company took no interest in the purchase as a holder of its own bonds so taken up, and had no property in the purchase liable to be reached by garnishment. Ibid. 67.

GUARDIAN AND WARD.

LOANS BY A GUARDIAN.

1. *Must be approved by county court.* Where a guardian loans his ward's money, the statute requires that the county court must approve the security; and the ward may treat a loan made without such approval

GUARDIAN AND WARD. LOANS BY A GUARDIAN. *Continued.*

of the county court as an appropriation of the money to the guardian's own use. The statutory requirement that the security shall be approved by the court is mandatory, not merely directory. *McIntyre* v. *The People, use, etc.* 142.

GUARDIAN'S BOND.

2. *Alteration of guardian's bond will not affect ward.* The adding of another name as security in the body of a guardian's bond, and the signing and sealing of such bond by the new surety, under an order of court requiring additional security, even if unlawful, will not affect the security of the ward in the bond as originally made, or defeat a recovery thereon; and if lawfully made, the ward may treat the bond as that of all the sureties named in it after its alteration, and may sue any one of such sureties separately. Ibid. 142.

3. *Action lies without first fixing guardian's liability.* Under the statute, it is not necessary that the guardian's account shall be adjusted in the county court, and the extent of his liability thereby ascertained, before an action will lie against his sureties upon his bond. The damages may be ascertained in the suit on the bond. Ibid. 142.

HEIRS.

HEIRSHIP BY CONTRACT.

1. *In respect to illegitimate child—degree and character of proof required.* Where there is an attempt to establish a verbal contract alleged to have been made by the putative father to make his illegitimate child an heir, by the testimony of the mother and other relations of the child alone, the evidence should be looked upon with great jealousy, and it should be weighed in the most scrupulous manner, to see what is the character and position of the witnesses generally, and whether they are corroborated to such an extent as to secure confidence that they are telling the truth. Such claims are always dangerous, and when they rest on parol evidence they should be strictly scanned, especially when an attempt is made, under cover of a parol contract, to effect a distribution different from that which the law makes. *Wallace* v. *Rappleye et al.* 229.

2. *Contract as to heirship of legitimate child—without notice of a prior agreement.* Where a divorced husband, in consideration of the release of dower by his former wife in all his lands, covenanted with her that on his death his and her son should receive the portion of the covenantor's estate that he would be entitled to by the laws of the State as a lawful heir, it was *held*, that such covenant was binding, and was a bar to any relief in equity on behalf of an illegitimate child of the covenantor, claimed under an alleged prior verbal promise by him to the mother of such child to make the latter an heir. To affect the mother of the lawful heir, or what she purchased by her contract, she must have

HEIRS. HEIRSHIP BY CONTRACT. *Continued.*

had notice of the prior agreement. She not having notice, her child would hold the favorable position of an innocent purchaser for value, without notice. *Wallace* v. *Rappleye et al.* 229.

ADOPTION OF CHILD.

3. *So as to confer the right of inheritance—requirements of the statute.* Under the statute, where there are husband and wife, the wife's interest as respects herself or her children in the right of inheritance can not be affected by any act of adoption by the husband alone of another's child than their own, giving it the right of inheritance, but there must be consent of the wife thereto. Ibid. 229.

USE OF THE WORD "HEIR" IN A WILL.

4. *Who is meant thereby.* See WILLS, 11.

HIGHWAYS.

STREETS.

1. *Dedication for streets—what becomes of the fee.* A statutory dedication vests the legal title to the soil, marked and properly designated for streets, in the city, while a common law dedication leaves the legal title in the original owner. *Gosselin* v. *City of Chicago*, 623.

2. *Insufficient acknowledgment of plat—estoppel—common law dedication.* The owners of land laid out into lots and streets by an agent not authorized to acknowledge the plat thereof, by the sale of the lots will be estopped from questioning the existence of the streets. Such acts will constitute a dedication at common law. Ibid. 623.

3. *Town plat—acknowledgment by attorney in fact—its effect.* Under the "Act providing for the recording of town plats," in force February 27, 1833, an attorney in fact was not authorized to acknowledge such plats, and a plat so acknowledged will not vest the legal title of the streets in the corporation. Ibid. 623.

4. *Power to sell and convey—extent of authority given thereby.* A power of attorney to sell and convey real estate simply, confers no power to lay off the same into town lots, so as to vest the fee of the streets in the municipality for the use of the public, nor does it authorize the agent to make a partition. Ibid. 623.

ROAD LAW OF 1877.

5. *Repealed.* The act of 1879 concerning "roads and bridges" is a revision of former laws on this subject, and in terms repeals the act of 1877, so far as it relates to counties under township organization, and also all other acts or parts of acts inconsistent therewith. *People, use of Town of Highland* v. *Suppiger et al.* 434.

APPEALS.

6. *On appeal from highway commissioners to three supervisors—how far and for what length of time the action of the latter is conclusive.* On an appeal from any order of the commissioners of highways

HIGHWAYS. APPEALS. *Continued.*

concerning a public road, where the three supervisors obtain jurisdiction, such jurisdiction is exclusive for the time being over the matters embraced in the appeal, and the power of the commissioners over the same subject matter is suspended for the period of one year, and they can not, within that period, make any orders except in furtherance of that of the supervisors. *People ex rel.* v. *Commissioners of Highways of Town of Oswego*, 640.

7. But if the period of one year from the making of the order by the supervisors to establish a road and assess the damages shall have elapsed, without any steps being taken to open the road or pay damages, the commissioners of highways may, if in their judgment the damages are manifestly too high, and their payment an unreasonable burden on the tax-payers of the town, make an order revoking or vacating all the proceedings of the supervisors. It seems the supervisors may do the same thing within the one year succeeding their action. Ibid. 640.

OBSTRUCTION—WHAT CONSTITUTES.

8. *Continuing the same.* The building of a fence upon a road, whether across the same or longitudinally with the road, is an obstruction thereof, within the meaning of section 58 of the Road law of 1874, and the person so obstructing is liable to the statutory penalty for suffering such fence to remain upon the road after being ordered to remove the same by the highway commissioners, although the penalty for the original obstruction may be barred by the Statute of Limitations. *Boyd* v. *The Town of Farm Ridge*, 408.

ROAD TAX—"ROAD AND BRIDGE TAX."

9. *How to be applied, respectively, under sections 16 and 119 of the act of 1879.* See TAXATION, 4 to 7.

ILLEGITIMATE CHILD.

HEIRSHIP BY CONTRACT.

Of the putative father. See HEIRS, 1.

INDUSTRIAL SCHOOLS.

OF THE ACT OF MAY 29, 1879.

1. *Constitutionality—as being in restraint of personal liberty.* Section 3 of the act entitled "An act to aid industrial schools for girls," approved May 29, 1879, which provides for the committing to such a school of dependent infant girls who beg or receive alms while selling or pretending to sell any article in public, or who frequent any street, alley or other place for the purpose of begging, or who have no permanent place of abode, proper parental care or guardianship, or sufficient means of subsistence, or who for other cause are wanderers through the streets and alleys or other public places, or who live with or frequent the company of, or consort with, reputed thieves or other vicious per-

INDUSTRIAL SCHOOLS. OF THE ACT OF MAY 29, 1879. *Continued.*

sons, or who are found in a house of ill-fame or a poor house, is not unconstitutional, as being in violation of the Bill of Rights in respect to personal liberty. *Petition of Ferrier*, 367.

2. Under such act due provision is made for the protection of all just rights, and the institution is not a prison, but a school; and the sending of a young female child there to be taken care of under a proper guardian to be appointed, who otherwise has no one to care for her, is not to be regarded as punishment. The restraint of liberty in such institution is no more than is found in any well regulated school. Such a degree of restraint as is essential to the proper education of a child, is in no just sense an infringement of the inherent and inalienable right to personal liberty. Ibid. 367.

3. The power conferred upon the county court under this act is but of the same character as the jurisdiction exercised by the courts of chancery over the persons and property of infants, having its foundation in the prerogative of the Crown, flowing from its general power and duty, as *parens patriæ*, to protect those who have no other lawful protector. Such an institution is but an agency of the State for the needful and proper control and care of female infants when found to be destitute of it. Ibid. 367.

NOTICE—TO WHOM TO BE GIVEN.

4. The statute provides merely that notice shall be given to the parents of such infant female. In this case written notice was served upon the mother, with a copy of the petition, on the day before the trial, and the step-father appeared. It was held there was notice in compliance with the statute, as opportunity was afforded to be present, and to apply for further time if not ready for the investigation. Ibid. 367.

AS TO THE NUMBER OF THE JURY.

5. Under the act of 1879 relating to the industrial school, the party sought to be adjudged a dependent infant female is not entitled to a jury of twelve persons, the act only giving six jurors. That provision of the constitution that "the right of trial by jury as heretofore enjoyed shall remain inviolate," does not apply in such a case, which is not a suit according to the course of the common law, but is purely a statutory proceeding, and under a statute enacted since the adoption of the constitution. Ibid. 367.

INHERITANCE.

HEIRSHIP BY CONTRACT. See HEIRS, 1, 2.

INJUNCTIONS.

TO RESTRAIN COLLECTION OF TAXES.

1. *On an assessment in wrong town.* Where a person voluntarily makes a return of his personal property to an assessor of a town other

INJUNCTIONS. TO RESTRAIN COLLECTION OF TAXES. *Continued.*

than that of the *situs* of the property, and which is subject to assessment in a different town, a court of equity will not enjoin the collection of the taxes extended upon such erroneous assessment on the ground that the party was induced to make such return in ignorance of the law, upon the statement of the assessor to him at the time that the taxes would be the same if the property was assessed in either town. Such statement can not render the assessment fraudulent, as the party is bound to know the law. *People ex rel. Johnson* v. *Atkinson*, 45.

ON DISSOLUTION OF INJUNCTION.

2. *As to suit at law—of the proper entry to be made.* Where an entry is made showing that the proceedings in an action at law have been enjoined in equity, and the suit at law continued for that reason, it is proper, before proceeding with the cause, that an entry should be made of record showing the dissolution of the injunction. *Blair* v. *Ray et al.* 615.

3. *Dismissal of suit at law—after dissolution of injunction—sufficiency of grounds for dismissal.* An order dismissing an action of replevin and ordering a return of the property, reciting that it appearing to the court that an injunction restraining the further prosecution of the suit has been dissolved, is not sufficient to show the reason for the dismissal. It shows only that the court was authorized to proceed in the cause. The dissolution of the injunction does not of itself furnish ground for a dismissal of the suit enjoined. Ibid. 615.

INSOLVENT DEBTORS.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Jurisdiction in county court. See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 2 to 5.

INSTRUCTIONS.

RIGHT TO HAVE PROPER INSTRUCTIONS GIVEN.

1. It is error to refuse an instruction which accurately states a rule of law applicable to the issues and evidence, when that rule is not announced in any others given. *Bennett* v. *Connelly*, 50.

OF THEIR QUALITIES.

2. *Giving facts of one side only.* An instruction which sets forth at length the facts as testified to by the party's own witnesses, and upon the hypothesis of the belief of such facts directs the jury how to find, is objectionable, and is properly refused. *Village of Warren* v. *Wright*, 298.

3. *The blending of separate and distinct legal propositions* in the same sentence or paragraph in an instruction, usually causes error, in that it tends to confuse and mislead, and should be avoided. *Chicago, Burlington and Quincy Railroad Co.* v. *Johnson, Admr.* 512.

INSTRUCTIONS. *Continued.*

USE OF "DUE AND PROPER CARE"—NEGLIGENCE.

4. *Whether the use of the words quoted, in an instruction, is the submission of a question of law to the jury.* See NEGLIGENCE, 1 to 4.

EXPLANATION OF TERMS, ETC.

5. It is often important and necessary for the court to explain to the jury the meaning of technical terms not in common use, or to define the meaning of words or phrases in a contract, statute, or the like. And it is proper for the court, on its own motion or on request, to define specifically what is meant in an instruction by the words "due and proper care," though there is no necessity for doing so except upon request. *Schmidt et al.* v. *Sinnott*, 160.

INSTRUCTIONS CONSTRUED.

6. *As whether assuming a controverted question of fact.* In an action against an incorporated village to recover for a personal injury alleged to have resulted from a defective sidewalk, the defendant asked an instruction to the effect that if the sidewalk was constructed by adjacent lot owners then there would be required of the corporation only a certain measure of diligence. The court modified this instruction by saying, "that where a corporation *authorizes* the lot owner to construct the sidewalk, it is the duty of the corporation," etc. The modification was held not to be obnoxious to the criticism that it *assumed* that the corporation authorized and directed the construction of the sidewalk, or that it was done under its supervision, when that was a contested point in the case whether the sidewalk was thus constructed, or was built entirely by the lot owner. The word "authorize" imported no more than the corporation *allowing* the lot owner to construct the sidewalk, as he might well have done under the village ordinance. *Village of Warren* v. *Wright*, 298.

7. On the trial of one for larceny of goods, the possession of which by the accused four days after the theft was not disputed, the court instructed the jury "that the possession of stolen property soon after the commission of the theft is *prima facie* evidence that the person in whose possession it is found is guilty of the wrongful taking, and is sufficient to warrant a conviction, unless the other evidence in the case or the surrounding circumstances are such as to raise a reasonable doubt of such guilt:" *Held*, that the instruction was proper, and not open to the objection that it assumed the existence of any fact necessary to be proven which was disputed on the trial. *Smith* v. *The People*, 82.

INSURANCE COMPANIES.

WHEN THEY MAY COMMENCE BUSINESS.

Preliminaries required under general law of 1869. Diversey v. *Smith*, 378. See CORPORATIONS, 10.

LIABILITY OF STOCKHOLDERS. See CORPORATIONS, 5 to 15.

INTERPLEADER.

IN PROCEEDING BY ATTACHMENT.

Of the issues to be tried. See ATTACHMENT, 2, 3, 4.

JUDGMENTS.

QUESTIONED BY A STRANGER.

1. A judgment or decree absolutely void for want of jurisdiction in the court, may be assailed by a stranger to the record, if it affects his prior or superior equities. Otherwise he can not intermeddle with it. *Freydendall et al.* v. *Baldwin et al.* 325.

JUDICIAL NOTICE. See EVIDENCE, 1.

JUDICIAL SALE.

SUBSEQUENT REVERSAL OF JUDGMENT.

Plaintiff procuring the sale not liable in trespass. See TRESPASS, 1.

JURISDICTION.

COUNTY COURT.

1. *In cases of misdemeanor.* The county court has jurisdiction to try an indictment for selling spirituous liquor to a minor without having the written consent of his parents, etc., when sent to it by the circuit court in pursuance of an application for a change of venue on account of the prejudice of the circuit judge. *Barr* v. *The People*, 110.

2. *In case of an assignment for the benefit of creditors—jurisdiction of county court exclusive.* See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 2 to 5.

COUNTY COURTS AND PROBATE COURTS.

3. *Of their jurisdiction of probate and other matters.* Section 18 of article 6 of the constitution of 1870, declares that county courts shall have jurisdiction in all matters of probate, settlement of estates of deceased persons, appointment of guardians and conservators, and settlement of their accounts, in all matters relating to apprentices, and in proceedings for the collection of taxes and assessments, and such other jurisdiction as may be provided for by general law. *Klokke* v. *Dodge*, 125.

4. By section 20 of the same article, it is provided that probate courts, when established under the constitution, shall have original jurisdiction in all matters of probate, the settlement of estates of deceased persons, the appointment of guardians and conservators, and the settlement of their accounts, in all matters relating to apprentices, and in cases of the sales of real estate of deceased persons for the payment of debts. Ibid. 125.

5. Upon the establishment of a probate court in a particular county, the county court of such county is at once, by operation of law, deprived

JURISDICTION. COUNTY COURTS AND PROBATE COURTS. *Continued.*

of its jurisdiction in matters of probate, and in all other matters over which probate courts are given jurisdiction. There can not be concurrent jurisdiction between the two courts in the same county. The jurisdiction of the probate courts is exclusive. *Klokke* v. *Dodge*, 125.

OF THE EXTENDED JURISDICTION OF COUNTY COURTS.

6. *In counties in which probate courts are or may be established—constitutionality of the act of 1881.* The act of 1881, "to extend the jurisdiction of county courts in counties in which probate courts are or may be established," provides, "that in all counties in which probate courts are or may hereafter be established, county courts may have concurrent jurisdiction with the circuit court in all cases at law and in equity, except criminal cases where the punishment may be death, or confinement in the penitentiary:" *Held*, the act was unconstitutional, the extended jurisdiction attempted to be thereby conferred being restricted to county courts in certain counties, and not affecting the county courts in all the counties in the State alike, thus being within the inhibition of that clause of sec. 29, art. 6, of the constitution, declaring the jurisdiction "of all courts of the same class or grade" shall be uniform. Ibid. 125.

7. So it was *held*, the county court of Cook county, that being one of the counties in which a probate court has been established, and in which it was sought to make the act operative, has no jurisdiction of a bill in chancery for relief against certain taxes alleged to have been illegally assessed against the property of the complainant. Ibid. 125.

WAIVER OF OBJECTION.

8. *For want of jurisdiction in chancery.* Where a defendant demurs to a bill to set aside a tax deed as a cloud upon title, on the ground it presents no case for the interposition of a court of equity, but declines to answer, even upon being ruled to answer, he will not be held as having waived his objection that there was a want of jurisdiction, on the ground of there being an adequate remedy at law. *Gage* v. *Griffin*, 41.

JURISDICTION IN CHANCERY.

9. *Generally.* See CHANCERY, 2, 10, 12, 13; TRUSTS AND TRUSTEES, 1, 2.

JURY.

RIGHT TO JURY OF TWELVE.

1. *Under the act of 1879 relating to the industrial school*, the party sought to be adjudged a dependent infant female is not entitled to a jury of twelve persons, the act only giving six jurors. That provision of the constitution that "the right of trial by jury as heretofore enjoyed shall remain inviolate," does not apply in such a case, which is not a suit according to the course of the common law, but is purely a statutory proceeding, and under a statute enacted since the adoption of the constitution. *Petition of Ferrier*, 367.

JURY. *Continued.*

MODE OF OBTAINING A JURY IN COUNTY COURT.

2. The county court is authorized by statute, when a jury has not been drawn and summoned as required in the circuit court, on the first day of the term, after ascertaining what cases are to be tried by jury, to have a *venire* issued for twelve jurors, or less, by agreement of the parties, who shall be summoned by the sheriff from the body of the county to serve as jurors for each trial had during the term. The order for such jury to serve during the term, instead of the particular case in which one is demanded, is not error. *Barr* v. *The People*, 110.

OBJECTION AS TO COMPETENCY.

3. *Whether availing on error when peremptory challenges are not exhausted.* In a criminal case, where the defendant was on trial upon a charge of robbery, a juror was challenged for cause, the ground of objection being that he could not understand the English language. Upon his examination the juror stated that he was a German; could read and speak English, but could not read writing in English. The challenge was disallowed in the court below, and the juror was sworn, and served as a juror in the case. On error it was *held*, without inquiring whether the juror was incompetent on the ground suggested, that inasmuch as it did not appear that the accused had exhausted his peremptory challenges, or that he subsequently had occasion to do so, the objection was not well taken. *Collins* v. *The People*, 21.

KANKAKEE RIVER IMPROVEMENT COMPANY.

OF ITS POWERS AND DUTIES.

1. *Of the duty to file with the Auditor sworn statements of the amount expended in improvements—effect of the act of 1865 in respect to such a requirement in the original charter.* Section 7 of the original charter of the "Kankakee and Iroquois Navigation and Manufacturing Company," passed in 1847, (of which company the "Kankakee River Improvement Company" is the successor,) reserved to the State the right to resume the control of the improvements authorized by the charter, at any time after twenty years, by paying to the company, or to the stockholders thereof, the cost of said improvements, with six per cent interest thereon per annum. The same section required the company to keep a true and accurate account of all expenditures made in respect to such improvements, and to file a copy of the same in the Auditor's office of this State, on or before the first Monday of January in each year, attested by the oath of the president of such company. In 1865 a supplementary act was passed, by the 5th section of which it was provided that the rights of property of the company should in no way thereafter be abridged or impaired, or affected by any prior legislation. This, it is held, operated to repeal that portion of the original charter which reserved to the State the right to resume the control of the improvements. The keeping and filing of accounts of the expenses of the improvements was

KANKAKEE RIVER IMPROVEMENT COMPANY.

OF ITS POWERS AND DUTIES. *Continued.*

merely incidental and subservient to the object of purchase by the State, that there might be means at hand of knowing the cost of the work, and which might be of aid and assistance in the exercise of the option to purchase. But the right of purchase having been relinquished by the State, then its incident, the keeping and filing of these accounts, followed it, and was no longer in force after the act of 1865. So the omission after that time to keep and file such accounts was no ground of forfeiture of the franchise of the company. *People ex rel. Attorney General* v. *Kankakee River Improvement Co.* 491.

2. *Of the character of the franchise conferred, as respects its entirety—and of the option to omit to do any part of the work proposed.* The original charter of the Kankakee and Iroquois Navigation and Manufacturing Company gave to that company power to improve the navigation of the Kankakee and Iroquois rivers from points mentioned, up the streams to the Indiana State line, "and also from and to any points on said streams intermediate the extremes hereinbefore mentioned." It was an integral work of the improvement of the navigation of the two rivers which the act contemplated, and it admitted no idea of separability, or of optional privilege on the part of the company in respect to the making or omission to make the proposed improvement upon any particular parts of the streams within the designated limits. Ibid. 491.

3. The 6th section of the act of February 16, 1865, amendatory of the original charter, directed the company "to lock and slack-water the Kankakee river from Kankakee City to the east line of the State of Illinois, within eight years from the passage of this act, with works sufficient to pass canal boats of the size of line boats on the Illinois and Michigan Canal." Prior to the act of 1865 there was no time prescribed within which this or any other part of the improvement was required to be completed. It was *held*, this 6th section was not to be construed as merely a limitation in point of *time*, upon the further enjoyment of a supposed option, as applicable to the particular portion of the work therein specified, such option going to the extent, as was contended, of relieving the company of any obligation to make the improvement at all, but was to be understood as a positive requirement, such as was embraced in the original charter, that the work should be done, and in respect to this particular portion that it should be done within the time limited. The requirement became an express condition annexed to the grant of the entire franchise conferred, which the company must have performed to entitle it to a continuance of its franchise. A non-compliance with the requirement would be *per se* a misuser, and a cause of forfeiture of the franchise as for condition broken. Ibid. 491.

4. Moreover, the franchise was entire in its character, embracing the whole improvement as contemplated in the original charter. It was not divisible so as to admit of a forfeiture as to a part and non-forfeiture as

KANKAKEE RIVER IMPROVEMENT COMPANY.
OF ITS POWERS AND DUTIES. *Continued.*

to the residue. An abuse in a particular department of an entire franchise is cause of forfeiture of the whole franchise. *People ex rel. Attorney General* v. *Kankakee River Improvement Co.* 491.

5. *Abuse of franchise—as to the exercise of a discretion whether there shall be a judgment of ouster, or only a fine imposed.* In case of an abuse of a franchise conferred upon a corporation, the statute gives to the court a discretionary power, instead of entering a judgment of ouster from the franchise, unless the court should be of opinion that the public good demands such judgment, to merely assess a fine. Where the omission of duty is of minor importance, the alternative of a fine may properly be considered, but when the non-performance is of a thing which is of the essence of the contract,—going to the object of the incorporation,—not doing the very thing the performance of which was the purpose and object for which the corporation was created, then the State may well resume the control of the subject involved, by a judgment of ouster. Ibid. 491.

6. So in the case of the Kankakee River Improvement Company, in its omission to comply with the requirement "to lock and slack-water the Kankakee river from Kankakee City to the east line of the State," there was a neglect to do that which was so essential to the accomplishment of the enterprise contemplated by the charter, that the public good required the State should resume the corporate franchise. Ibid. 491.

STATE AID FOR IMPROVEMENT OF RIVERS.

7. *Constitutional inhibition as to railroads and canals.* It was objected to the resumption by the State of the franchise granted for the improvement of the navigation of the Kankakee and Iroquois rivers, as for a misuser, that work which had already been done in furtherance of the project would fall into decay and ruin, from inability of the State to make repairs and keep it up, because of the provision of the constitution of 1870 that "the General Assembly shall never loan the credit of the State, or make appropriations from the treasury thereof, in aid of railroads or canals." It was *held*, this provision did not apply. It does not respect rivers,—and a river does not become a canal from having its navigation improved by artificial means. Ibid. 491.

LESSEE OF FRANCHISE—IN PART.

8. *Effect of acts of forfeiture as to other parts.* Where a private corporation holds a franchise which is entire in its character, as, to improve the navigation of a river between certain designated points, but with the power to lease a portion of the works, a lessee of such portion will hold subject to the risk of forfeiture of the entire franchise if his lessor should be guilty of default in respect to the improvement of any other portion of the stream. The lessee in such case would take as in case of any other conditional estate, subject to the condition, and with the liability to forfeiture for breach of the condition. Ibid. 491.

LACHES. See LIMITATIONS, 12 to 15.

LANDLORD AND TENANT.

AS TO THE USE OF A BUILDING.

1. *Breach of landlord's agreement as to character of use of other portions of building—to defeat a recovery of rent.* Where a landlord agrees with the tenant at the time of making the lease of a portion of a building that he will not lease any other part of such building for a saloon, or for saloon purposes, in consideration of which the lease is accepted, a subsequent leasing of a part of such building, before the term expires, for the excepted purpose, and permitting it to be used for that purpose, when the original tenant does not leave the premises demised to him, but enjoys them for the balance of the term, will not defeat a recovery of the rent from the prior tenant for the time such other part of the building was so improperly occupied and used. Such an agreement is not a condition precedent to the right to recover rent, and does not go to the entire consideration, but is to be taken as a stipulation, the breach of which only gives an action for damages to the lessee. *Chicago Legal News Co.* v. *Browne et al.* 317.

2. The rule is well settled that the wrongful act of the landlord does not debar him from a recovery of rent, unless the tenant, by such act, has been deprived in whole or in part of the possession, either actually or constructively, or the premises are rendered useless. Ibid. 317.

LAW AND FACT.

WHAT CONSTITUTES ORDINARY CARE.

1. In an action to recover for injuries resulting from the alleged negligence of the defendant, an instruction is faulty which details certain facts as constituting ordinary care and diligence, instead of leaving it to the jury to determine, from all the evidence in the case, whether there had been the exercise of due care and diligence by the party charged with negligence. *Village of Warren* v. *Wright*, 298. See NEGLIGENCE, 6.

"DUE AND PROPER CARE."

2. *As to the use of those words in an instruction—whether submitting a question of law. Schmidt et al.* v. *Sinnott*, 160. See NEGLIGENCE, 1 to 5.

LESSEE.

LESSEE OF FRANCHISE—IN PART.

Effect of acts of forfeiture as to other parts. See KANKAKEE RIVER IMPROVEMENT COMPANY, 8.

LEVY AND SALE ON EXECUTION.

EFFECT OF SUBSEQUENT REVERSAL.

As to liability of plaintiff in trespass. See TRESPASS, 1.

LICENSES.

TO KEEP A DRAM-SHOP.

1. *Arbitrary discrimination as to persons.* Under a general ordinance of a city for licensing dram-shops, the city authorities have no right to make an arbitrary discrimination in granting licenses. They can not grant the same to a favored few and refuse it to another who has in all respects complied with the ordinance and laws of the State, and who is admitted to be in every respect a suitable person. *Zanone* v. *Mound City*, 552.

2. The business of dealing in liquor is recognized by the constitution as a legitimate business, and a license to keep a grocery or dram-shop is placed in the same category with licenses to carry on any other lawful business, and it must be dealt with according to law, and special privileges are not to be granted to particular persons. Ibid. 552.

EXTENT OF LIMITATION.

3. *And in what manner to be prescribed.* The court is not prepared to decide that municipal authorities may not refuse a license to persons of such habits and character as render them unfit persons to be licensed, or that they may not limit the number of dram-shop keepers to be licensed; but this must be done, if at all, by ordinance, and it would seem that in such a case, to avoid favoritism and monopoly, some provision should be made for a fair competition among suitable persons seeking such privileges. Ibid. 552.

REMEDY IN CASE OF REFUSAL.

4. *When the granting will be compelled by mandamus.* Any one who has brought himself strictly within the requirements regulating the licensing power, may compel by *mandamus* the corporate authorities to grant him a license when it is refused through mere caprice. Ibid. 552.

LICENSE FEE ON DOGS.

5. *Is not a tax—constitutionality of the act imposing it.* See DOGS—LICENSE FEE, 1.

LIENS.

HOW LIENS ARE CREATED—AND BY WHOM.

1. *Lien of carrier for demurrage.* All liens are created by law or by contract of the parties, and when the law gives none, neither party can create one without the consent or agreement of the other. Hence the consignee of goods shipped by railroad is not bound by rules and regulations of the railway company providing for a lien for demurrage, though published, without his or the consignor's assent thereto when the contract for shipping the goods was made. Even a knowledge of such rules, without assent thereto, will not affect the shipper or consignee. *Chicago and Northwestern Railway Co.* v. *Jenkins*, 588.

LIENS. *Continued.*

PRIORITY OF RIGHT—HOW ACQUIRED.

2. *When not acquired merely by the institution of suit.* The mere institution of a suit at law by one of several creditors of an insolvent bank to enforce the personal liability of a stockholder for the payment of his claim, does not give him a prior right or lien on the fund when collected, to the exclusion of all other creditors of the bank, and the fact that such creditor was prevented from obtaining final judgment in his suit at law by injunction on bill filed by other creditors, after the bringing of the suit at law, can make no difference. Such fund, when collected of the stockholder, under decree in the suits in chancery, is for the benefit of all the creditors who are parties to the suits in equity. In this State it is the final judgment or decree of the court which creates a lien. *City of Chicago et al.* v. *Hall et al.* 342.

LIEN OF A DECREE.

3. *On lands in a different county.* The lien of a decree being limited by the statute in its territorial extent the same as that of a judgment at law, does not extend to lands of a defendant situate in a county other than that in which the decree was rendered, and the court rendering the decree has no power to extend its lien beyond the limits of the county, by declaring it shall be a lien on lands in such other county. *Sapp* v. *Wightman*, 150; *Yackle* v. *Wightman*, 169.

4. *Effect of section 6 of the Divorce act.* The power to make a decree for alimony a lien upon lands out of the county, is not conferred by section 6 of the Divorce act, which gives the court power to "enforce payment of alimony by causing the defendant to give security for the payment thereof, *or in any other manner* consistent with the rules and practice of the court." This implies, only, that resort may be had to the known modes under the rules of practice for enforcing writs, orders and decrees, such as sequestration, attachment for contempt, etc., or to the statutory method of creating a lien upon lands within the court's jurisdiction. *Sapp* v. *Wightman*, 150.

5. *On change of venue in suit for divorce—giving alimony in lieu of dower—effect as to extent of lien.* The fact that a suit for a divorce and alimony is brought in one county, and taken by change of venue to another, will not give the decree of the court in the latter county any more effect, as a lien upon land in the county where the bill was originally filed, than if it had been brought in the court in which the decree was entered, nor will the fact that alimony is decreed to be taken in satisfaction of dower, make any difference as to the lien of the decree. Ibid. 150.

6. *How a decree or judgment may be made a lien in another county.* To make a judgment or decree rendered in one county, on change of venue, a lien, under the act of 1874, upon the defendant's real estate in the county where the suit was brought, a transcript thereof must be

LIENS. LIEN OF A DECREE. *Continued.*

filed with the clerk of the circuit court of the latter county, and an entry of the same made in the judgment docket, after which such judgment or decree will have the same effect as if rendered in the court in which the suit was originally instituted. The recording of a copy of such decree in the book of the record of deeds, in pursuance of a direction in the decree, will not be regarded as a compliance with the statute, and will create no lien upon the defendant's lands as against an innocent purchaser for value. *Yackle* v. *Wightman*, 169.

VENDOR'S LIEN.

7. *Waived by taking collateral security.* The vendor of real estate, by taking collateral or other security for the purchase money, waives his lien on the property sold. *Ilett et al.* v. *Collins et al.* 74.

8. *Lost when the debt is barred by limitation.* Where the debt for the purchase money of real estate is barred by the Statute of Limitations, no vendor's lien can exist that may be enforced. Ibid. 74.

LIMITATIONS.

COMMENCEMENT OF SUIT.

1. *What constitutes, as affecting the limitation of actions.* The bringing of a suit is the issuing of a summons or other process to bring the defendant into court. The substitution of the assignee of a bankrupt as plaintiff in a suit, is not to be regarded as the commencement of the suit by the assignee, within the meaning of the United States statute limiting such actions to two years after the assignee's appointment. *Chicago and Northwestern Railway Co.* v. *Jenkins*, 588.

AS TO CASES EMBRACED IN STATUTE.

2. *Generally.* In construing statutes of limitation, the courts can only hold that they embrace such subjects as are specifically named or embraced in enumerated classes. Cases or classes not enumerated are excluded from their operation by implication. Ibid. 588.

3. *As to suits by assignee in bankruptcy—under the act of Congress—to what suits the statute applies.* The statute of the United States limiting the bringing of suits by the assignee of a bankrupt within two years from the time of his appointment, was designed only to apply to suits brought by him, and not to actions already pending in which he may be substituted as plaintiff, although such substitution may be more than two years after his appointment. Ibid. 588.

PENDENCY OF SUIT.

4. The Statute of Limitations does not run against a cause of action after a suit thereon is commenced, and during its pendency, and numerous cases hold that the mere commencement of a suit without service within the statutory period, will prevent the statute from becoming a bar. Ibid. 588.

LIMITATIONS. *Continued.*

MAKING NEW PARTIES.

5. *Or introducing new matter, by amendment.* Where not only new parties are made in a pending suit, but by amendment also new rights or causes of action already barred are brought before the court, the Statute of Limitations may be properly set up as to such new matter, but not where no new rights are brought into the suit which were not barred when the suit was brought. *Chicago and Northwestern Railway Co.* v. *Jenkins*, 588.

ACTION FOR STATUTORY PENALTY.

6. *As, to enforce the liability of trustees and corporators of insurance companies.* The 14th section of the Statute of Limitations provides: "Actions for a statutory penalty shall be commenced within two years next after the cause of action accrued." *Gridley* v. *Barnes et al.* 211.

7. The liability of the trustees and corporators of insurance companies, arising under the 16th section of the general law in relation to insurance, approved March 11, 1869, is imposed, not as upon contract, but by way of a statutory penalty only. So a cause of action arising under that section is within the 14th section of the Limitation law, and will be barred after two years from the time it accrued, if suit be not brought within that time. Ibid. 211.

EFFECT OF SAVING CLAUSE.

8. *In acts repealing certain statutes of limitation—former decision.* The 14th section of the Statute of Limitations referred to is a part of the act approved April 4, 1872, and the 24th section of the same act (which repeals certain former acts of limitation) contains a saving clause, that "this section shall not be construed so as to affect any rights or liabilities or any causes of action that may have accrued before this act shall take effect." A cause of action arising under section 16 of the general Insurance law was not embraced in any of the statutes repealed by the 24th section. Prior to 1872 there was no general Limitation law in cases of actions for statutory penalties. So such causes of action are in no way affected by that saving clause. Ibid. 211.

9. In the case of *Dickson* v. *Chicago, Burlington and Quincy R. R. Co.* 77 Ill. 331, the saving clause in section 24 of the Limitation act of 1872 was construed as if the words "this act" had been used instead of the words "this section." This construction was given in respect to a cause of action embraced in the Limitation act of 1849, but the saving clause so construed does not affect causes of action not embraced in the statutes repealed by the 24th section. The 14th section will still be given effect as to preëxisting causes of action for a statutory penalty. Ibid. 211.

VENDOR'S LIEN.

10. *Is lost when the debt is barred by limitation.* Where the debt for the purchase money of real estate is barred by the Statute of Limitations, no vendor's lien can exist that may be enforced. *Ilett et al.* v. *Collins et al.* 74.

LIMITATIONS. *Continued.*

WRIT OF ERROR.

11. *In cases arising under the Burnt Records act.* The limitation of twelve months from the entering of the final decree in a suit instituted under the Burnt Records act of 1872, within which a writ of error may be sued out, as provided in the 16th section of that act, applies to cases of that character which may have been determined in an Appellate Court, as well as to cases where the writ of error is sought to be sued out of the Supreme Court to a circuit court. *McClure* v. *Walker et al.* 544.

LAPSE OF TIME FROM THE STATUTE.

12. *Delay in avoiding sale under deed of trust.* Where lots of a person were sold under a deed of trust given by him, and he acquiesced in the trustee's sale and conveyance up to the time of his death, which was more than seven years after the sale, during which time others acquired title under that sale, and no claim was set up to the property by the heirs of the grantor for more than twenty years after the sale, it was *held*, that both the grantor and those claiming under him were estopped to deny that the trustee's sale and deed were valid, and that they were barred by their *laches*. *Miller et al.* v. *Shaw et al.* 277.

13. So, where a trustee, under a power in a trust deed, sold and conveyed all the lots embraced in the trust deed, more than six years before the grantor's death, and the grantor knew of such sale, and that the purchaser claimed all the lots, the latter frequently applying to the grantor to raise the money with which to pay the indebtedness, or to take back the property, which he failed to do, and finally the grantor told the purchaser to keep the property and do the best he could with it, as he could not do anything more, this was *held* such an acquiescence in the sale as to estop him and those claiming under him from asserting title to the lots, and that his *laches* was a bar to any equitable relief. Ibid. 277.

14. *As to administrator's application for sale of land.* A delay of seven years from the grant of letters by an administrator to apply for an order for the sale of land to pay debts, when not sufficiently explained, showing a valid reason for the *laches*, is sufficient to defeat the application. *Furlong, Admx.* v. *Riley et al.* 628.

15. *Sufficiency of reasons for delay.* The fact of the destruction of the records and files of the court by fire, and the neglect, for a number of years, of the administratrix (who was the widow) to have her award fixed by the appraisers, will not furnish sufficient ground to excuse a delay of ten years after the grant of letters in applying for an order to sell real estate of the intestate to satisfy such widow's award. The administratrix can not urge her own neglect of duty as a ground for avoiding the limitation. Ibid. 628.

LIMITATIONS. *Continued.*

LIMITATIONS—LACHES—HOW AVAILED OF.

16. *When by demurrer.* Where the fact that a debt sought to be collected is barred by the Statute of Limitations, appears on the face of the bill, advantage may be taken of the bar on demurrer. *Ilett et al.* v. *Collins et al.* 74.

17. Where the *laches* of a complainant sufficient to bar a recovery appears on the face of the bill, the defendant may raise the question of the sufficiency of the bill as well by demurrer as by answer. *Furlong, Admx.* v. *Riley et al.* 628.

18. Where an administrator's petition for leave to sell real estate to pay debts, filed more than seven years after the grant of letters, attempts to give an excuse for the delay, and thereby to avoid the defence of *laches*, the question of *laches* is properly presented by demurrer, and need not be set up by answer. Ibid. 628.

LIS PENDENS. See NOTICE, 2.

MANDAMUS.

IN THE SUPREME COURT.

1. *As an original proceeding—practice—not controlled by the statute.* The statute regulating the practice in *mandamus* cases (Rev. Stat. 1874, p. 691,) has no application to practice in the Supreme Court. It was designed to regulate the practice in the circuit courts, and not in this court. However, the practice in such cases in this court will be made to conform, as nearly as may be, to that as regulated by statute in the circuit courts. *People ex rel.* v. *Thistlewood et al.* 139.

2. *Petition filed only upon leave—summons awarded only upon cause—when returnable.* The summons in *mandamus*, in an original proceeding in the Supreme Court, will not be awarded as a matter of course, but only upon cause shown by petition,* and the petition can be filed only upon leave granted for that purpose. Ibid. 139.

3. If, upon examination of the petition, no cause is shown for awarding the summons, it will be denied,† as was the practice in this court before the passage of the statute. Where the petition shows sufficient

* The writ of *mandamus* will not be awarded in the Supreme Court upon mere motion,—a petition must be presented showing the grounds of the application. *The People ex rel.* v. *Loomis*, 94 Ill. 587.

† This writ is not now, as formerly, a prerogative writ; it is nothing more, under our statute, than an ordinary action at law in cases where it is the appropriate remedy. Yet it is to be issued in the discretion of the court. *People ex rel.* v. *Weber*, 86 Ill. 285. Under the statute, the petition takes the place of the alternative writ, and defects in it are to be taken advantage of as they were when found in the alternative writ; and defects in substance can be taken advantage of at any time before the granting of the peremptory writ,—even after return made. *People ex rel.* v. *Davis*, 93 Ill. 133.

MANDAMUS. IN THE SUPREME COURT. *Continued.*

cause, the summons will be ordered to be issued, as it would from the circuit court.* *People ex rel.* v. *Thistlewood et al.* 139.

4. If the matter to be litigated concerns the public interest, the court has uniformly made the writ returnable to the term at which the application is made, but if it be of a mere private nature, the practice is to make the writ returnable to the succeeding term. Ibid. 139.

5. *Also, of the time of service of the summons.* The summons should, in any case, be made returnable at a time not less than five days prior to the hearing, but there is nothing in the statute or in the practice that obtains, which requires there should be five days service before the matter can be heard in this court. Ibid. 139.

CONTINUANCE—IN MANDAMUS.

6. *For want of service.* It is a sufficient ground for a continuance in a proceeding for *mandamus* in this court, where the action or conduct of several persons is sought to be affected or controlled by the writ, that some of the persons so to be affected have not been served with the summons. Ibid. 139.

TO COMPEL THE GRANTING OF LICENSE.

7. *To keep a dram-shop.* See LICENSES, 4.

MARRIED WOMEN.

CONVEYANCE OF THEIR SEPARATE PROPERTY.

1. *All that was required by the laws in force in 1867,* to enable a married woman to convey her real estate, was that she and her husband should execute the deed, after which she should appear before a proper officer and acknowledge the same in the mode pointed out in the statute, and such deed being acknowledged by the husband, or his execution thereof proven according to law, it was effectual to pass the title to the wife's separate property. *Miller et al.* v. *Shaw et al.* 277.

2. *Construction of a deed—as to the proper parties.* In the beginning of a deed for the separate real estate of a wife, where the parties are first stated, "A B, in her own right, wife of C D," was named as party of the first part, and her husband was not otherwise named in that clause of the deed as the party making the grant, but in the clause releasing the homestead the husband was named as "party of the first part," and so in the covenanting and attesting clauses, and he also signed and acknowledged it as his and his wife's deed: *Held,* that even if the statute of 1845 required the husband to join in the granting clause, that fact was sufficiently shown by the deed, taking the whole of it together. Ibid. 277.

* Upon asking leave to file a petition for a writ of *mandamus* in this court, it is not necessary to couple with such application a motion that a summons or an alternative writ be awarded. Upon granting leave to file the petition, if, upon examination, it is found that sufficient cause is shown, the summons will be awarded without any special motion for that purpose. *Blatchford et al.* v. *Newberry et al.* 100 Ill. 484.

MASTER'S REPORT.

TIME TO EXCEPT THERETO. See PRACTICE, 7.

MASTER AND SERVANT.

LIABILITY OF MASTER FOR WRONGFUL ACTS OF SERVANT.

1. *In the scope of his employment.* Where a clerk of a city railway company has assigned to him the general and special duty of looking for and arranging the evidence in cases where the company is sued by persons injured, or claiming to be injured, by the carelessness of those intrusted with the management and operation of its street cars, and is empowered generally to perform that duty without special directions, with general authority to use his own judgment in the performance of his duties, if he, in looking up the evidence in the case, wrongfully and without authority offers money to a witness to keep him from testifying against the company, or to influence his testimony, the company must be held responsible for his act, and it is proper evidence against the company. *Chicago City Railway Co.* v. *McMahon*, 485.

2. The master is liable for not only the careless and negligent acts, but also for the willful and malicious acts of his servant while acting within the scope of his duty or employment. This rule is well recognized in this State. Ibid. 485.

3. *Where a servant goes outside of his employment*, and while not acting in pursuance of the authority given him inflicts a willful injury upon one not entrusted to his care by the master, or on one to whom the master owes no duty, the act will be that of the servant alone, and the master can not be held responsible for it. *Chicago and Eastern Railroad Co.* v. *Flexman*, 546.

4. *Carrier's duty to protect passengers—liability for acts of servant.* A carrier, whether by steamboat, railway, or otherwise, is under obligation to convey his passenger safely and properly, and to treat him respectfully, and if he entrusts this duty to his servants, the law holds him responsible for the manner in which they execute the trust. Ibid. 546.

5. A carrier must not only protect his passengers against the violence and insults of strangers and co-passengers, but also against the violence and assaults of his own servants. If this protection is not afforded, and the passenger is assaulted and beaten through the negligence of the carrier's servants, he will be responsible for the injury, and especially for the assault of his servants. Ibid. 546.

6. Where a passenger on arriving at the place to which he had paid his fare on a railroad train missed his watch, and supposing it to have been stolen, refused to leave the train until he should recover his watch, and the conductor consented that he might remain on the train until it reached another station, and after the train had started and a partial search had been made, a passenger asked who he thought had his watch,

MASTER AND SERVANT.

LIABILITY OF MASTER FOR WRONGFUL ACTS OF SERVANT. *Continued.*

when he replied, "That fellow," pointing at a brakeman, who immediately struck him in the face with a lantern: *Held*, that the facts showed a right of action against the railroad company for the injury inflicted by its servant, and that the company occupied the same position towards the passenger as if he had paid his fare to such other station. *Chicago and Eastern Railroad Co.* v. *Flexman*, 546.

MEASURE OF DAMAGES.

IN ACTION FOR MONEY HAD AND RECEIVED.

1. A plaintiff has a right to recover, in an action for money had and received, only such sum as in equity belongs to him. *Bennett* v. *Connelly*, 50.

2. Where an attorney received a sum of money from the purchaser of property at a sale on partition of land as a part of the price which was paid him to prevent the sale from being opened and a re-sale ordered, his client, who is entitled to only one-half of the property sold, or its proceeds, will not be entitled in a set-off to recover the whole sum thus received by the attorney, but only one-half thereof, and the attorney will be liable to the other owners for the balance. Ibid. 50.

CONDEMNATION FOR TELEGRAPH PURPOSES.

3. *Of the proper damages to be recovered.* See EMINENT DOMAIN, 5.

MORTGAGES AND DEEDS OF TRUST.

FORECLOSURE—ADVERSE TITLES.

1. *Former decision.* On bill in chancery to foreclose a mortgage, the complainant also sought to have set aside a tax deed for the premises embraced in the mortgage, as an alleged cloud upon the title of the mortgagee. The bill made the alleged owner of the tax deed a party defendant, averring that his claim of title was under a tax sale which was void, and that whatever interest he had in the premises was subsequent and subordinate to the rights of the mortgagee. For want of any answer by that defendant the bill was taken as confessed against him, and a final decree was entered annulling and setting aside his tax deed as a cloud upon complainant's title. Upon the question as to the right of the court below to entertain the bill at all, in so far as it concerned the alleged claim under the tax deed, this court said there seemed to be a misapprehension as to the true scope and effect of the decision in *Gage* v. *Perry*, 93 Ill. 176, where it was held that a court of equity had no right, upon a bill to foreclose a mortgage, to consider and pass upon an independent adverse claim of title, unconnected with that under which the mortgagee claimed, and alleged to be a cloud upon the mortgagee's title. In that case the owner of the tax title which constituted the alleged cloud,

MORTGAGES AND DEEDS OF TRUST.

FORECLOSURE—ADVERSE TITLES. *Continued.*

appeared, and answered, setting up his title as adverse to and independent of the supposed title of the mortgagor or of the mortgagee. That decision should be limited to the facts so disclosed. In this case no such defence was set up, and the allegations of the bill were admitted by the default to be true. *Chicago Theological Seminary* v. *Gage*, 175.

RENTS AND PROFITS.

2. *As between mortgagor and mortgagee—in case of joint occupancy.* A mortgagor and mortgagee farmed the mortgaged premises upon shares,—the mortgagee being in possession, and the mortgagor, the son of the mortgagee, residing with his father. The latter, in the cultivation of the farm, furnished most of the teams, boarded the hands, and the crops were equally divided. Upon bill to foreclose the mortgage, it was *held*, that during the time the mortgaged premises were cultivated upon the joint account of the mortgagor and mortgagee, the latter ought not to be charged with rents. *Brainard et al.* v. *Hudson et al.* 218.

SALE UNDER DEED OF TRUST.

3. *Of the notice of sale—effect of making publication in advance of the time required.* Where a deed of trust requires thirty days' notice to be given previous to a sale, by publication once in each week for four successive weeks, a notice of the sale published the first time a few days more than thirty days prior to the sale, and continued in three other issues of the paper, weekly, is not invalid, but is a substantial compliance with the power. It may be that a notice in such a case published a great length of time before the sale, would be no notice at all, though within the letter of the power. *Taylor* v. *Reid et al.* 349.

4. *Of notice under statute—as to the first and last days of publication.* The provision of the statute relating to sales under powers in mortgages and deeds of trust, requiring at least thirty days' previous notice of a sale to be given, whether so specified in the power or not, and that such notice shall be given by publication, once in each week for four successive weeks, in some newspaper, etc., does not require that the last publication shall be at least thirty days before the sale, but it is sufficient that the first publication shall be at least thirty days before the sale, and the publication shall be continuous, as nearly as possible, in weekly newspapers, for thirty days prior to the sale. Ibid. 349.

5. *And herein, of the evidence of the publication of notice of sale.* A certificate of the publisher of a weekly newspaper, that the notice of the sale of land under a trust deed, of which an annexed slip is a true copy, was published for four successive weeks, to-wit: four times in the "Chicago Legal News," a weekly secular newspaper, published every

MORTGAGES AND DEEDS OF TRUST.

SALE UNDER DEED OF TRUST. *Continued.*

Saturday in, etc., and that the date of the first paper containing the same was the 9th day of November, A. D. 1878, and that the date of the last paper containing the same was the 30th day of November, 1878, the sale being advertised to take place on December 10, 1878, is a substantial compliance with the statute relating to such notices, and is sufficient evidence of the publication of the notice of the sale, which is required to be made on thirty days' prior notice, by publication for four successive weeks. *Taylor* v. *Reid et al.* 349.

6. *Publication of notice in advertising pages of "Chicago Legal News."* A notice of sale under a trust deed was given on sheets of advertisements attached to the "Chicago Legal News," which sheets or pages were headed "Chicago Legal News," and were of the same size as the other pages of the paper, and folded and sent out to subscribers with and as a part of the "Legal News." The pages containing law or miscellaneous reading were numbered consecutively both at the top and bottom of the page, but the pages containing advertisements were numbered consecutively with the other pages at the bottom only, and in this respect, and in the fact that the entire page is filled with advertisements only, did these pages differ from the others: *Held*, that the pages of the paper containing legal notices were as much a part of the "Legal News" as any other part of the pages of that publication, and proof of these facts did not impair the evidence of due publication afforded by the publisher's certificate. Ibid. 349.

7. *When retention of notes does not invalidate sale.* Where a sale is made of lots under a power in a deed of trust to the party holding the notes secured, and the amount of the sales credited on the notes, their retention by the payees, not as subsisting liabilities, but simply as a muniment of title, will not invalidate the sale, or give the former owner, the debtor, the right to redeem from the sale. Ibid. 349.

SUBSEQUENT DECLARATION OF TRUST.

8. *Destroyed by sale under prior deed of trust.* If there be a valid sale and conveyance of land by a trustee under a power in the deed of trust to him, such action will cut off all rights of third parties under a declaration of trust made by the grantor in the trust deed after the recording of the trust deed. *Miller et al.* v. *Shaw et al.* 277.

TRUSTEE'S DEED.

9. *Construed—whether showing sale of several, or only one lot.* Where a trustee under a deed of trust conveying several lots, after a sale by him, conveys to the purchaser all such lots, and in one part of his deed recites the sale by him of one lot, this will not defeat his deed for the other lots when from the whole deed and all its recitals it sufficiently appears he made sale of all the lots conveyed. Ibid. 277.

10. *Recitals in trustee's deed—as evidence of facts recited.* See EVIDENCE, 7.

MORTGAGES AND DEEDS OF TRUST. *Continued.*

REDEMPTION.

11. *Of railroad property sold on foreclosure.* Where a railroad, its appurtenances and franchises, are mortgaged as a whole, there is no power or authority to sell them separately, and such property, taken as a whole, not being, strictly speaking, either real or personal estate, when sold on a decree of foreclosure is properly sold without any right of redemption. The rule is founded partly upon considerations of public policy. *Peoria and Springfield Railroad Co.* v. *Thompson*, 187.

WHAT PASSES UNDER FORECLOSURE.

12. *As to bonds given in pledge.* See GARNISHMENT, 2.

APPLICATION OF PAYMENTS.

13. *Duty of holder of mortgage, as to subsequent purchaser from mortgagor.* See PAYMENTS, 6.

MUNICIPAL CORPORATIONS. See CORPORATIONS, 19.

NEGLIGENCE.

"DUE AND PROPER CARE"—"ORDINARY CARE."

1. *As to instructing the jury on the subject—whether submitting a question of law.* An instruction in an action for a personal injury growing out of the alleged negligence of the defendant, which submits to the jury the question whether the plaintiff, at the time of the injury, was exercising "*due and proper care*," is not open to the objection that it submits a question of law to the jury. *Schmidt et al.* v. *Sinnott*, 160.

2. The words "due and proper care," and "ordinary care," are not unlike in their character in such connection, and while it is the province of law to determine in the abstract what is "ordinary care" as well as what is "due care," yet where a plaintiff bases his right to recover for an injury received at the hands of the defendant, in part upon an allegation that at the time of receiving such injury he was exercising due care, and such allegation is traversed by the defendant's plea, the issue thus formed presents a question of fact for the determination of the jury, precisely in the same manner as if the words "ordinary care" had been used. Ibid. 160.

3. It can not be said that an instruction framed in the very words of the issue is improper, as submitting to the jury a mere question of law, which simply tells the jury, in order to recover it must appear from the evidence that the plaintiff was exercising due and proper care at the time of receiving the injury. Ibid. 160.

4. *Former decision.* If some of the expressions used in the case of *Stratton* v. *Central City Horse Railway Co.* 95 Ill. 25, are in conflict with these views, they must be regarded as modified accordingly. Ibid. 160.

NEGLIGENCE.

"DUE AND PROPER CARE"—"ORDINARY CARE." *Continued.*

5. It is often important and necessary for the court to explain to the jury the meaning of technical terms not in common use, or to define the meaning of words or phrases in a contract, statute, or the like. And it is proper for the court, on its own motion or on request, to define specifically what is meant in an instruction by the words "due and proper care," though there is no necessity for doing so except upon request. *Schmidt et al.* v. *Sinnott*, 160.

6. An instruction is faulty which details certain facts as constituting ordinary care and diligence, instead of leaving it to the jury to determine, from all the evidence in the case, whether there had been the exercise of due care and diligence by the party charged with negligence. *Village of Warren* v. *Wright*, 298.

NOTICE TO DEFENDANT OF IMPENDING DANGER.

7. *When necessary.* In an action to recover damages for a personal injury resulting from the alleged negligence of the defendant, the plaintiff having himself contributed to such result by negligence on his part, by placing himself in a situation of danger, if the question arises as to the measure of care it was the duty of the defendant to have observed in case it was in his power to have avoided the consequences of the plaintiff's negligence, then in order to charge the defendant it must be shown he had knowledge of the peril in which the plaintiff had placed himself, or the equivalent of such knowledge, at least long enough before the injury inflicted, to have enabled him to form an intelligent opinion as to how the injury might be avoided, and to apply the means. *Chicago, Burlington and Quincy Railroad Co.* v. *Johnson, Admr.* 512.

CONTRIBUTORY AND COMPARATIVE NEGLIGENCE.

8. To authorize the plaintiff to recover on the ground of the mere negligence, as distinguished from the willful tort, of the defendant, it must appear that the party injured exercised ordinary care, such as a reasonably prudent person will always adopt for the security of his person or property, to avoid the injury complained of. In the absence of ordinary care on the part of the plaintiff, in such case, there is no right of action, and can be no recovery. Ibid. 512.

9. In applying the rule that the plaintiff may recover in an action for negligence, notwithstanding he has been guilty of contributive negligence, where his negligence is but slight and that of the defendant gross in comparison with each other, it must be understood the terms "slight negligence" and "gross negligence" are used in their legal sense, as defined by common law judges and text writers, and as expressing the extremes of negligence, of which there are no degrees. In giving the definitions of the degrees of negligence, the word "diligence," as used in that connection, is synonymous with "care." So it is said, gross negligence is the want of slight diligence. Slight negligence is the want of

NEGLIGENCE.

CONTRIBUTORY AND COMPARATIVE NEGLIGENCE. *Continued.*

great diligence, and intermediate there is ordinary negligence, which is defined to be "the want of ordinary diligence." *Chicago, Burlington and Quincy Railroad Co.* v. *Johnson, Admr.* 512.

10. In applying the measure of slight and gross negligence, however, to the acts of the respective parties charged to have been negligent, it is, of course, to be considered that the term "negligence" is, itself, relative, and its application must depend on the situation of the parties, and the degree of care and vigilance which the circumstances reasonably impose. So that in each case, where there has been contributory negligence on the part of the plaintiff, and he seeks still to recover under the rule in respect to comparative negligence, the question will relate to the measure of care, under the circumstances shown by the evidence to have existed, imposed upon the parties respectively. Ibid. 512.

11. In this case, where the plaintiff sought to recover for the death of his intestate, caused by the alleged negligence of the defendant railroad company in the running and management of a locomotive and train of cars on its road, the evidence tending to show contributory negligence on the part of the person killed, the trial court, in undertaking to lay down the rule of comparative negligence, instructed the jury, at the instance of the plaintiff, that although it should appear that the plaintiff's intestate was not exercising ordinary care, yet the plaintiff might recover if the negligence of his intestate was slight and that of defendant was gross in comparison with each other. It was *held*, the rule was not correctly stated, as it can not legally be true that where the person injured fails to exercise ordinary care, and the defendant is guilty of negligence only, the negligence of the person injured is slight and that of the defendant gross in comparison with each other. Ibid. 512.

EVIDENCE.

12. *In action to recover for injuries resulting from the alleged negligence of the defendant.* See EVIDENCE, 9 to 12.

NEGOTIABLE SECURITIES.

EQUITABLE DEFENCES—INNOCENT HOLDERS.

Holders of railroad coupon bonds secured by deed of trust—whether subject to equitable defences—application of the doctrine of Olds v. *Cummings*, 31 Ill. 188, and *Chicago, Danville and Vincennes Railway Co.* v. *Loewenthal*, 93 Ill. 433. *Peoria and Springfield Railroad Co.* v. *Thompson*, 187. See ASSIGNMENT, 1 to 4.

NEW TRIALS.

IN CRIMINAL CASES.

1. *Misdirection by the court.* The guilt or innocence of the accused in a criminal case is always a question for the jury, and their finding will

NEW TRIALS. IN CRIMINAL CASES. *Continued.*

seldom be disturbed unless when it is manifest that they have been misled by the instructions of the court to the prejudice of the defendant. *Smith* v. *The People*, 82.

2. *Upon the evidence.* In a criminal case, it is only when this court is able to say, from the insufficiency or unsatisfactory character of the evidence, there is clearly a reasonable and grave doubt of the guilt of the accused, that it will be justified in setting aside a conviction on the ground it is not supported by the evidence. *Collins* v. *The People*, 21.

UPON NEWLY DISCOVERED EVIDENCE.

3. Newly discovered evidence which is merely cumulative and impeaching in its character, does not afford ground for a new trial, except under special circumstances; and where it is not shown to the contrary, it will be assumed that the facts proposed to be proven by the alleged newly discovered witnesses were known to the party making the application, before the trial. Ibid. 21.

4. A defendant convicted of selling liquor, on the testimony of a witness showing such sale in 1878, moved for a new trial, the motion being based upon his affidavit that since the trial he had a conversation with the witness, who told affiant that he was mistaken as to the year of the sales, and that he had not bought any liquor of affiant since the early part of the spring of 1877, any sale prior to that time being barred, and that such witness would so testify on a new trial. The affidavit of the witness was not produced, but its absence was satisfactorily accounted for, and an offer to procure the same was made, if the court would withhold its decision to a later day, which the court refused to do, and denied the motion: *Held*, that the court should have given further time, or have granted the motion for a new trial. *Fisher* v. *The People*, 101.

IN EJECTMENT—UNDER THE STATUTE.

5. *Statute applies only to the trial courts.* The statute giving the unsuccessful party in an action of ejectment a right to take a new trial within one year after judgment, by paying the costs, applies only to judgments in the circuit court, and does not authorize the vacation of a final judgment in such a suit in this court. *Lowe* v. *Foulke et al.* 58.

NOTICE.

SERVICE OF NOTICE ON CORPORATION.

1. Notice of the acceptance of a cancellation of a contract served upon a private corporation by leaving the same at the company's business office with a person acting as its agent, and at the time in charge of its business, is a good service as to the company. *Parmly* v. *Buckley et al.* 115.

LIS PENDENS.

2. *As to lands.* The commencement and pendency of a bill for divorce, which merely sets forth the defendant's lands as affecting the

NOTICE. LIS PENDENS. *Continued.*

amount of alimony to be allowed, but asserts and seeks no right in respect to them, is no notice *lis pendens* to affect the rights of purchasers from the defendant. *Sapp* v. *Wightman*, 150.

POSSESSION OF LAND.

3. *As notice of rights under unrecorded deed or mortgage.* Where a person is in possession of land under an unrecorded deed, that possession is notice to all subsequent purchasers or incumbrancers of whatever title is held by the person in possession, to the same extent as if his deed were duly recorded, and a subsequently acquired title, although first on record, will be held subject to the title which the person in possession may have to the property. This rule applies as well to possession held under an unrecorded mortgage. *Brainard et al.* v. *Hudson et al.* 218.

4. *Effect of possession by widow and heirs of mortgagee.* Where a mortgagee of lands dies while in the actual occupancy of the same, the possession being continued in his widow and heirs, the possession of the latter will afford the same notice to subsequent purchasers and incumbrancers as respects rights existing under the mortgage, as though the mortgagee himself were still living and in possession. Ibid. 218.

5. So where the mortgagor, in such case, made a second mortgage on the same premises, after the death of the prior mortgagee, but while the widow and heirs of the latter were still in possession, the second mortgagee took subject to the prior mortgage although the same was unrecorded. Ibid. 218.

NEGLIGENCE.

6. *In an action to recover for injury from alleged negligence, when defendant must have notice of the impending danger.* See NEGLIGENCE, 7.

SALE UNDER DEED OF TRUST.

7. *Of the proper notice—and of the publication thereof.* See MORTGAGES AND DEEDS OF TRUST, 3 to 6.

UNDER ACT RELATING TO INDUSTRIAL SCHOOLS.

8. *To whom notice must be given.* See INDUSTRIAL SCHOOLS, 4.

ORDINANCES.

OF THEIR REQUISITES.

1. Ordinances must be general in their character, and operate equally upon all persons within the municipality of the same class to whom they relate; they must not be in violation of any law, contrary to public policy, or unnecessarily oppressive, and must not unjustly and arbitrarily discriminate between citizens of the same class. *Zanone* v. *Mound City*, 552.

EXEMPTION FROM WATER TAX.

2. *In Chicago—an ordinance construed.* See TAXATION, 3.

PARKS.

CONDEMNATION OF LAND.

1. *Power of park commissioners to locate boulevards to connect with other parks.* Under section 12 of the act of 1869, in regard to the completion, improvement and management of public parks, etc., the West Chicago Park Commissioners have the power to condemn land for a boulevard within their district, to connect the park and boulevard under their control with those under the control of the South Park Commissioners. This section relates to a new and entirely different subject matter, not provided for in the original act relating to the West Chicago Park. *West Chicago Park Commissioners* v. *Western Union Telegraph Co. et al.* 33.

2. *Two sets of commissioners not required to join in proceeding to condemn.* Section 12 of the act of 1869 is general, and has no specific reference to any particular park commissioners, and is limited only to the effect that the parks whereof they are commissioners shall have been established in two or more towns contiguous to each other. It does not require that two sets of commissioners shall constitute a new and single board for the purpose of connecting their several parks. Each set of commissioners simply acts within its own district. If the parks sought to be connected lie in separate districts, it may require coöperative action to complete the connection. But in such case the jurisdiction of each of the commissioners must terminate with the boundary of their respective districts. Ibid. 33.

3. *Who are "corporate authorities."* The West Chicago Park Commissioners are a *quasi* municipal corporation, capable of being invested by the legislature with power to assess and collect taxes within the district, and have the power to condemn land for the purpose of making a boulevard or pleasure way connecting two or more parks already established by law. Ibid. 33.

PARTIES.

PURCHASE AT EXECUTION SALE—FAILURE TO PAY.

1. *Who may sue.* An action of assumpsit will not lie in favor of the plaintiff in execution, against a bidder at sheriff's sale under the execution, for failing to complete his purchase by payment of the purchase money, there being no privity between the parties. *People* v. *Stelle*, 467.

2. The sheriff who makes a sale under execution, alone, can maintain an action against the purchaser for a breach of his contract of purchase. The sheriff, in making such sale, does not act as the agent of the creditor, but as an officer of the law in performing a legal duty. Ibid. 467.

IN SUIT ON INSURANCE POLICY ASSIGNED.

3. *Who must sue.* Policies of insurance are but *choses in action*, and governed by the same principles applicable to *choses in action* in general. They are assignable in equity only, and in this State courts of

PARTIES. IN SUIT ON INSURANCE POLICY ASSIGNED. *Continued.*

law will not recognize the assignment so as to allow the assignee to sue on the policy in his own name. *United States Life Ins. Co.* v. *Ludwig*, 305.

4. The payment of a premium on a policy of life insurance by the assured, after an assignment to his children, for them, when the policy is to him and in his name, or even a payment by the assignees, when no new undertaking or promise is made to them, will not authorize a recovery in the names of the assignees, even under the common counts. The suit must be brought in the name of the party having the legal interest, though it may be for the use of the party having an equitable interest. Ibid. 305.

ASSIGNEE IN BANKRUPTCY.

5. *Substitution as plaintiff.* Under section 5047 of the Revised Statutes of the United States, the assignee, at any time after his appointment, has the right to be substituted as plaintiff, on his request, in an action pending in the name of the bankrupt for the recovery of a debt or other thing which might or ought to pass to the assignee, who may thereafter prosecute the suit the same as if originally brought in his name, and such substitution will furnish a good replication to a plea in abatement of the plaintiff's bankruptcy. *Chicago and Northwestern Railway Co.* v. *Jenkins*, 588.

PARTITION.

APPORTIONING SOLICITOR'S FEE.

1. The statute that in proceedings for the partition of land the court may apportion the costs, including reasonable solicitor's fees, among the parties to the suit, applies only to amicable suits for partition, and not to cases where the defendants have employed counsel for themselves to protect their interests. *Cowdrey* v. *Hitchcock et al.* 262.

PAYMENT.

WHAT CONSTITUTES PAYMENT.

1. *Whether a particular transaction amounts to a payment.* A person conveyed four lots to an agent of an insurance company to secure the payment of notes to the company for money loaned, and also assigned a policy of insurance upon his life to the same agent, as security for the payment of two other notes given the company for another loan, and the agent gave back a writing, stating that if the notes, or either of them, was not paid, the agent might surrender the policy to the company for its value, to be determined by the officers of such company, and such sum should be applied upon the four notes, whether due or not. The policy was not surrendered to the company upon any terms, but the agent assigned the same to another person: *Held*, that the contingency on which the proceeds of the policy were to be applied on the notes never

PAYMENT. WHAT CONSTITUTES PAYMENT. *Continued.*

happened, and that payment of the notes could not be held as against one acquiring the lots from the grantee of the debtor. *De Clerq et al.* v. *Jackson et al.* 658.

EXTENT OF PAYMENT.

2. *As to satisfaction of a judgment—conveyance of land to be applied thereon.* Where the beneficial plaintiff in a judgment takes a conveyance of a lot to be applied in payment on the judgment, no price being agreed upon for the lot, or as collateral security for the payment of the judgment, such conveyance will not operate to satisfy the judgment, so as to prevent the subsequent issue of an execution, and a levy and sale thereunder. The judgment creditor in such case, in the absence of proof of the value of the lot conveyed, will be held as having been and paid only the net sum realized from the property above all prior liens incumbrances paid by him to make the title clear and good. Ibid. 658.

APPLICATION OF PAYMENTS.

3. *In case of a special security for part of a debt—as to the privilege of the creditor.* A, and a coal and iron company, in which he was largely interested, being indebted to a bank in the sum of $17,000 for advances, A made and delivered his note and mortgage for $10,000, payable to the order of B, in one year, with interest, to secure $10,000 of the debt due the bank, after which A conveyed the premises to C, with covenants of warranty, upon a valid consideration, and from time to time made payments to the bank until over $12,000 of the debts making up the sum of $17,000 were paid, without giving any directions as to what part of the indebtedness the payments should be applied: *Held*, that the payments thus made discharged the note and mortgage. *Fridley* v. *Bowen et al.* 633.

4. The note and mortgage were pledged as collateral security for the payment of $10,000 of the $17,000 due, and not for the payment of the latter amount. In such a case no privilege is left with the creditor to apply the payments to a part of the debt not covered by the pledge. Ibid. 633.

5. It is one thing for a man to bind his land to the extent of $10,000 that the whole of a $17,000 debt shall be paid, and quite another thing to bind his land to the extent of $10,000 that ten-seventeenths of the whole debt shall be paid. In both cases the charge upon the land is limited to the sum of $10,000, but in the first case it can only be discharged by payment of the whole of the $17,000, or by payments made to that extent *specifically* on the mortgage note, or specifically to discharge the lien upon the land, while in the latter case the land is discharged by the payment of any part of the $17,000 debt to the extent of ten-seventeenths thereof. Ibid. 633.

6. *Subsequent purchaser from mortgagor—duty of holder of mortgage.* The holder of a note secured by deed of trust as collateral

PAYMENT. APPLICATION OF PAYMENTS. *Continued.*

security, without actual notice of a subsequent purchase from the mortgagor, is not bound to act with reference to such purchaser's rights in applying payments as a credit. *Riddle et al.* v. *Rosenfeld et al.* 600.

7. *In case of several debts.* A debtor by note, and also on an account, has a right, on making a payment, to direct its application to either the note or the account. *Craig* v. *Miller*, 605.

8. *Evidence as to application of payments—indorsement of the payment by the creditor.* Where the maker of a note in a suit thereon testified that in making a payment he directed it to be applied on the note, and the plaintiff that it was made to be applied on an account, it was *held*, error to allow the plaintiff to give in evidence to the jury a copy of the account with his indorsement of the credit thereon, made of his own motion, without the privity of the maker of the note or his surety, and to allow the jury to take such account and indorsement with them on their retirement. The entry of a payment on an account by a creditor instead of on a note of the person paying, is of itself no evidence of any authority to make such application. Ibid. 605.

PENAL STATUTE.

DEFINED.

1. A penal statute is an act by which a forfeiture is imposed for transgressing the provisions of the act. It may also be remedial in one part, and penal in another. The effect, and not the form, of the statute is to be considered, and if its object is clearly to inflict a punishment on a party for doing what is prohibited, or failing to do what is commanded to be done, it is penal in its character, and the circumstance that, in punishing, a remedy is likewise afforded to those having an interest in the observance of the statute, is unimportant. *Diversey* v. *Smith*, 378.

GENERAL INSURANCE LAW OF 1869.

2. *In respect to the nature of the liability of stockholders, whether arising as a penalty, or upon contract.* See CORPORATIONS, 11, 12, 13.

PLEADING.

PLEA IN ABATEMENT.

1. *Requisites.* See ABATEMENT, 1.

STATUTE OF LIMITATIONS—LACHES.

2. *When it may be availed of on demurrer.* See LIMITATIONS, 16, 17, 18.

IN PROCEEDING BY QUO WARRANTO.

3. *Requisites of the information—necessity for a replication.* See QUO WARRANTO, 1.

PLEADING AND EVIDENCE.

ALLEGATIONS AND PROOFS.

1. *Literal proof* of every allegation of a bill in chancery, as, on a bill for divorce as to cruelty, is not required. Substantial proof of the material allegations is sufficient. *Ward* v. *Ward*, 477.

WHETHER THERE IS A VARIANCE.

2. *Where evidence tends to prove allegations.* Where several things are averred as forming the consideration of a guaranty, if there is evidence tending to prove each one, there is no variance. *Ives* v. *McHard*, 97.

ONLY MATERIAL AVERMENTS NEED BE PROVED.

3. The plaintiff is only required to prove the material allegations of his declaration. If two considerations for the contract are alleged, one good and the other immaterial, as forming none, the plaintiff will only be required to prove the one which is sufficient. Ibid. 97.

REPRESENTATIVE CAPACITY OF PLAINTIFF.

4. *How put in issue.* Where the plaintiff sues in a representative capacity, as administrator, for example, if the defendant would contest his right thus to sue, he must make denial of it by plea. The general issue in such case is a waiver of all exception to the person of the plaintiff. *Chicago Legal News Co.* v. *Browne et al.* 317.

PLEA OF NUL TIEL CORPORATION.

5. *Of the evidence thereunder.* The plea of *nul tiel corporation* is a proper plea in a suit by a corporate body, when it is denied there is any such body, but under that plea it is sufficient for the corporation to prove that it is known and transacts business under the corporate name in which the suit is assumed to be brought, or is a corporation *de facto*. It is not necessary under such plea in such suit to show that the plaintiff is a corporation *de jure*, as in case of a *quo warranto*. *Osborn* v. *The People ex rel. Lewis*, 224.

PLEDGE.

PLEDGE OF ACCOMMODATION PAPER.

And payment of the principal debt—whether a discharge of a mortgage given to secure the paper pledged, as against holders of such paper pledged a second time. See ACCOMMODATION PAPER, 9.

POLICE POWER OF THE STATE.

IMPOSING LICENSE FEE ON DOGS. See DOGS—LICENSE FEE, 2.

POSSESSION.

POSSESSION OF LAND.

As notice of occupant's rights. See NOTICE, 3, 4, 5.

POWERS.

POWER TO SELL AND CONVEY LAND.

1. *Extent of authority given thereby.* A power of attorney to sell and convey real estate simply, confers no power to lay off the same into town lots, so as to vest the fee of the streets in the municipality for the use of the public, nor does it authorize the agent to make a partition. *Gosselin* v. *City of Chicago*, 623.

PRACTICE.

ON DISSOLUTION OF INJUNCTION.

1. *As to suit at law—of the proper entry to be made.* Where an entry is made showing that the proceedings in an action at law have been enjoined in equity, and the suit at law continued for that reason, it is proper, before proceeding with the cause, that an entry should be made of record showing the dissolution of the injunction. *Blair* v. *Ray et al.* 615.

DISMISSAL OF SUIT AT LAW.

2. *After dissolution of injunction—sufficiency of grounds for dismissal.* An order dismissing an action of replevin and ordering a return of the property, reciting that it appearing to the court that an injunction restraining the further prosecution of the suit has been dissolved, is not sufficient to show the reason for the dismissal. It shows only that the court was authorized to proceed in the cause. The dissolution of the injunction does not of itself furnish ground for a dismissal of the suit enjoined. Ibid. 615.

LACHES—HOW AVAILED OF.

3. *When by demurrer.* Where the *laches* of a complainant sufficient to bar a recovery appears on the face of the bill, the defendant may raise the question of the sufficiency of the bill as well by demurrer as by answer. *Furlong, Admx.* v. *Riley et al.* 628.

4. Where an administrator's petition for leave to sell real estate to pay debts, filed more than seven years after the grant of letters, attempts to give an excuse for the delay, and thereby to avoid the defence of *laches*, the question of *laches* is properly presented by demurrer, and need not be set up by answer. Ibid. 628. Also, see LIMITATIONS, 16.

TIME TO OBJECT.

5. *As to amending bill in chancery.* Where no objection is taken in the court below to amending a bill for the specific performance of a contract for the sale of real estate, so as to seek a cancellation of the contract, it can not be urged as a ground of error in a court of review. *Papin et al.* v. *Goodrich et al.* 86.

6. *In chancery—multifariousness, or that there is a remedy at law—within what time to object.* See CHANCERY, 23.

7. *Time to object to master's report.* Upon reference to the master to state the account, in a suit to foreclose a mortgage, if the action of

PRACTICE. TIME TO OBJECT. *Continued.*

the master is not satisfactory, the party objecting should appear before the master and file exceptions to the report, and, if overruled by the master, the exceptions disallowed, together with the evidence bearing on the same, will be filed by the master in the court in which the suit is pending, where a hearing can be had before the court, and the decision of the court may be questioned upon error or appeal. Objection to the master's report can not be taken, in the first instance, in a court of review. *Brainard et al.* v. *Hudson et al.* 218.

WHEN SPECIFIC OBJECTION SHOULD BE MADE.

8. *And of the time—substitution of assignee in bankruptcy as plaintiff.* Where a defendant suffers the assignees in bankruptcy of the plaintiff to be substituted as parties in his stead, without objection or exception at the time, and proceeds afterward to plead to the merits and go to trial, he waives any irregularity there may have been in the substitution, and it will be too late for him to move for a discontinuance for that cause after the case has been remanded from the Appellate Court. Such an objection should have been specifically taken before the first trial on the merits. *Chicago Legal News Co.* v. *Browne et al.* 317.

PRACTICE IN THE SUPREME COURT.

MOTIONS—REQUISITES.

1. *Motion should state proper grounds.* A motion to dismiss an appeal for an alleged want of jurisdiction in this court, will not be entertained except it be accompanied by a statement of the particular ground upon which the question of jurisdiction is to arise. *Schofield et al.* v. *Pope,* 138.

ONLY THE RECORD WILL BE CONSIDERED.

2. This court, on error or appeal, will not notice any proceedings had in the Appellate Court in a different case, which are not presented in the transcript of the record before it, to see on what grounds that court reversed a judgment, nor can it look to the report of such case in that court, where the record shows nothing as to such report. *Field et al.* v. *Anderson,* 403.

WAIVER OF RELIEF SOUGHT IN BILL.

3. Where a creditor's bill asked that a voluntary assignment of a debtor, for the benefit of creditors, be set aside as fraudulent, but the matter was not pressed in the court in which the cause was first heard, nor in the Appellate or this court, counsel stating in this court that his position is not hostile to the assignment: *Held,* that the part of the bill seeking to have the assignment set aside must be treated as having been waived. *Freydendall et al.* v. *Baldwin et al.* 325.

PARTY CONTROVERTING HIS OWN PROPOSITION.

4. Where a party asks and obtains instructions that an agreement not to collect more than legal interest on a note forms no sufficient consider-

PRACTICE IN THE SUPREME COURT.

PARTY CONTROVERTING HIS OWN PROPOSITION. *Continued.*

ation for a guaranty of its payment, he will not, on appeal or error, be allowed to controvert such proposition. *Ives* v. *McHard*, 97.

ERROR WILL NOT ALWAYS REVERSE.

5. *As to admission of evidence.* On the trial of an action to recover for an injury from a defective sidewalk, the court admitted on the part of the plaintiff evidence of the rebuilding of the walk, the manner in which it was built, and that it was different from the mode of the original construction: *Held*, that while this evidence should not have been received, yet as there was much testimony that the sidewalk had come to be in a manifestly defective and unsafe condition, the reception of such evidence was not a fatal error. *Village of Warren* v. *Wright*, 298.

6. In the same proceeding it was error to admit evidence on the part of the plaintiff that he was a married man, and had a family; but the defendant having proved the same fact, and the plaintiff's counsel afterwards having withdrawn such evidence from the jury, the error was regarded as a harmless one, though there might be a question whether the withdrawal of the plaintiff's evidence on this point would have cured the error. Ibid. 298.

ENTERING PROPER JUDGMENT.

7. *In ejectment—after remittitur.* Where judgment in ejectment was erroneously rendered in favor of the plaintiff for an entire tract of land, the proof showing title to an undivided part of the premises in another person not a party, whose precise interest was not disclosed by the record, it was *held*, that this court could not, on appeal, allow a *remittitur*, and render final judgment for the recovery of the plaintiff's interest, for the reasons that the outstanding interest was not made certain, and because the defendant was entitled to a new trial under the statute at any time within a year from the date of the judgment below, on payment of the costs. *Lowe* v. *Foulke et al.* 58.

AFFIRMANCE OF JUDGMENT.

8. *When the dismissal of a writ of error amounts to an affirmance of the judgment—as affecting liability on supersedeas bond.* See SUPERSEDEAS BOND, 1.

MANDAMUS.

9. *As an original proceeding in the Supreme Court—practice therein.* See MANDAMUS, 1 to 5.

PRESUMPTIONS.

OF LAW AND FACT.

1. *As to death of a person.* Where it is shown that a person was living some years before the trial of a suit, no presumption will arise, in the absence of proof, that he has since died. *Lowe* v. *Foulke et al.* 58.

PRESUMPTIONS. OF LAW AND FACT. *Continued.*

2. *As to assent of shipper to rules of railroad company.* See CARRIERS, 7.

3. *As to right to use a corporate seal by agent of corporation.* See AGENCY, 2.

4. *In support of judgment in trial court.* See EXCEPTIONS AND BILLS OF EXCEPTIONS, 1; REPLEVIN, 1.

PROBATE COURTS.

JURISDICTION.

Exclusive in probate matters. See JURISDICTION, 3, 4, 5.

PROCESS.

UNDER THE EMINENT DOMAIN ACT.

1. *Of the summons in proceeding to condemn land for right of way —to whom to be made returnable.* See EMINENT DOMAIN, 2.

SERVICE OF PROCESS.

2. *On corporation.* On a bill by a director of a private corporation and others, stockholders and creditors of the corporation, the only service on the corporation was by leaving a copy of the summons with the complainant director, the return stating that "the president, clerk, secretary, superintendent, general agent, cashier and principal of said company not found." The bill alleged that the president and all the other directors and officers of the company were non-residents: *Held*, that the service as to the corporation was void, the director with whom the notice was left being a party complainant in the suit, and, the service being void, advantage might be taken of it on error as well as in the trial court. *St. Louis and Sandoval Coal and Mining Co.* v. *Edwards et al.* 472.

SERVICE—IN MANDAMUS.

3. *In the Supreme Court—time of service.* See MANDAMUS, 5.

PUBLICATION OF NOTICE.

OF SALE UNDER DEED OF TRUST. See MORTGAGES AND DEEDS OF TRUST, 3 to 6.

PURCHASERS.

PURCHASER AT EXECUTION SALE.

1. *As to equities between the parties.* A purchaser of land at a sheriff's sale on execution, who is not a party to the judgment, need not concern himself in regard to any equities between the parties,—he is only bound to look to the judgment, the levy and the sheriff's deed, for the protection of his title. *Davis* v. *Moore*, 445.

SUBSEQUENT PURCHASER FROM MORTGAGOR.

2. *Application of payments—duty of holder of mortgage, as to subsequent purchaser.* See PAYMENTS, 6.

PURCHASERS. *Continued.*

PURCHASER FROM A TRUSTEE.

3. *Holding subject to equities against his grantor.* See TRUSTS AND TRUSTEES, 3.

PURCHASER AT TAX SALE.

4. *Must know whether the property is delinquent.* See CHANCERY, 11.

QUO WARRANTO.

PLEADING.

1. *Requisites of the information—replication.* An information in the nature of a *quo warranto* against a corporation, for a forfeiture of its franchises, may charge it generally with usurpation, without setting out the causes of forfeiture; and on defendant setting forth the act of incorporation, and justifying under it, the Attorney General may reply the cause of forfeiture generally. Where the plea admits the facts which are relied upon as causes of forfeiture, and justifying, etc., that will dispense with the necessity of a replication showing them, and a demurrer to the plea will present the whole merits of the case. *People ex rel. Attorney General* v. *The Kankakee River Improvement Co.* 491.

RAILROADS.

RIGHT TO ISSUE BONDS OR STOCK.

1. *Constitutional prohibition against issue of bonds or stock, except for money, labor or property received.* The object of sec. 13, art. 11, of the present constitution, in providing that "no railroad corporation shall issue any stock or bonds, except for money, labor or property actually received and applied to the purposes for which such corporation was created," and that "all stocks, dividends, and other fictitious increase of the capital stock or indebtedness of such corporation shall be void," was to prevent reckless and unscrupulous speculators, under the guise or pretense of building a railroad or of accomplishing some other legitimate corporate purpose, from fraudulently issuing and putting upon the market bonds or stocks that do not, and are not intended to, represent money or property of any kind, either in possession or in expectancy, the stock or bonds in such case being entirely fictitious. *Peoria and Springfield Railroad Co.* v. *Thompson*, 187.

2. *And herein, of the rights of innocent holders of railroad bonds.* But it was not intended by that provision to interfere with the usual and customary methods of raising funds by railroad companies, by the issue of its stocks or bonds, for the purpose of building their roads, or of accomplishing other legitimate corporate purposes. Under that provision of the constitution, railroad companies have no right to lend, give away, or sell on credit, their bonds or stock, nor have they the right to dispose of either, except for a present consideration, and for a corporate purpose. But if, upon a sale of its stocks or bonds by a railroad company for a

RAILROADS. RIGHT TO ISSUE BONDS OR STOCK. *Continued.*

present consideration, it should subsequently divert the proceeds to other than corporate purposes, the purchaser of such stock or bonds, who has acted in good faith in the matter, or his assignee, can not be affected by the subsequent misappropriation by the company. *Peoria and Springfield Railroad Co.* v. *Thompson*, 187.

3. In short, where one, for a present consideration, in good faith purchases bonds or stocks in the regular course of business from a railroad company, and such consideration is accepted by the proper officer of the company, and nothing appears to show that it is to be used or applied to other than legitimate corporate purposes, such bonds or stocks, when thus issued, will be regarded as having been issued for money, labor or property "actually received and applied," within the meaning of the constitutional provision. Ibid. 187.

EQUITABLE DEFENCES—AGAINST INNOCENT HOLDERS.

4. *Where railroad coupon bonds are secured by mortgage.* See ASSIGNMENT, 1 to 4.

RAILROAD COUPON BONDS.

SECURED BY MORTGAGE—EQUITABLE DEFENCES.

1. *Innocent holders not subject to the rule in Olds* v. *Cummings*, 31 Ill. 188, and the doctrine of *Chicago, Danville and Vincennes Railway Co.* v. *Loewenthal*, 93 Ill. 433, *in that regard, modified.* See ASSIGNMENT, 1 to 4.

RECEIVER.

WHETHER PROPERLY APPOINTED.

1. *To take charge of affairs of corporation.* On a bill by a portion of the stockholders, a director and creditor of a private corporation against the corporation and the other stockholders, alleging mismanagement of the business of the company, its insolvency, its ceasing to prosecute the work for which it was organized, and that it would be useless to resume business, on account of financial embarrassment, and praying for a dissolution of the corporation and the appointment of a receiver, in which the defendant stockholders were properly served by actual or constructive notice of the suit, though the service of summons as to the corporation itself was void, it was *held*, that a clear case was shown for the appointment of a receiver, and the part of the decree making such appointment was affirmed, while that part dissolving the corporation was reversed for want of proper service on the corporation. *St. Louis and Sandoval Coal and Mining Co.* v. *Edwards et al.* 472.

RECORDING ACT.

DEED FIRST RECORDED MUST PREVAIL.

1. Where a deed of trust on certain real estate given to secure an indebtedness of the grantor is recorded before any other deed made by

RECORDING ACT. DEED FIRST RECORDED MUST PREVAIL. *Continued.*

him is filed for record, a regular foreclosure of the trust deed by a sale that would bar the grantor's equity of redemption, will cut off and bar all claim of title of parties claiming under a deed from such grantor, which was recorded after the trust deed. *Miller et al.* v. *Shaw et al.* 277.

CLAIMANT UNDER TRUST DEED.

2. *Conveyances subsequent to such deed.* A person buying or taking as collateral security notes secured by trust deed, is under no obligation to search the records before buying or taking the same, to ascertain what conveyances the grantor in the trust deed, or his grantee, has made since the making and recording of the deed of trust. The law charges such purchaser with notice of conveyances in the direct line of the title he is buying, and nothing more. *Miller et al.* v. *Larned et al.* 562.

REDEMPTION.

SALE OF RAILROAD ON FORECLOSURE.

1. *As to the right of redemption.* See MORTGAGES AND DEEDS OF TRUST, 11.

FROM SALE OF LAND FOR TAXES.

2. *Sale from time to time regarded as only one sale—of redemption therefrom.* See TAXATION, 8.

REMAINDERS.

OF VESTED AND CONTINGENT REMAINDERS.

1. Where a conveyance of a particular estate is made to support a remainder over, the tenant for the particular estate takes it, and if the remainder-man is in being, he takes the fee. In such a case the remainder is not contingent as to its becoming a vested remainder, because the title vests in the remainder-man on the delivery of the deed. The title thus vested becomes an estate of inheritance, and in case the remainder-man dies before the previous estate is expended, the title passes to his heirs, unless the deed directs otherwise. *Smith et al.* v. *West et al.* 332.

2. A remainder is vested when there is a fixed right of future enjoyment. A vested remainder is a fixed interest, to take effect in possession after the intervening estate is spent or ceases, but if it be uncertain whether a use or estate limited *in futuro* shall ever vest, that use or estate is contingent. The fact, however, that the remainder-man may die before the tenant for life, will not affect the vested nature of the estate. It is the present capacity of taking effect in possession, in case the prior estate were determined, that distinguishes a vested from a contingent remainder. Ibid. 332.

3. Where a conveyance is made to a woman, of a life estate, and the remainder to the children of her body, or such as may be living at her death, or the descendants of any one that may be then deceased, it will pass immediately to her children a vested remainder in fee, and not a contingent remainder. Ibid. 332.

RENTS AND PROFITS.

AS BETWEEN MORTGAGOR AND MORTGAGEE.

In case of joint occupancy. See MORTGAGES AND DEEDS OF TRUST, 2.

REPLEVIN.

WHETHER PROPERTY WAS REPLEVIED.

1. *Presumption—admission.* Although the sheriff's return to a writ of replevin fails to show a taking of the property under the writ, and its delivery to the plaintiff, it will be presumed in favor of a judgment for a return of the property, in the absence of any contrary showing in the record, that there was evidence justifying the action of the court. And an assignment of error questioning the propriety of the action of the court below in ordering a return of the property replevied, seems to be an implied admission that the property had been in fact replevied. *Blair* v. *Ray et al.* 615.

RESCISSION OF CONTRACTS.

BY THE PARTIES. See CONTRACTS, 12.

REVERSAL OF JUDGMENT.

RIGHT OF RESTITUTION.

1. *When the judgment has been paid.* After the reversal of a judgment, the prevailing party is entitled to restitution of the money received under the judgment. He may recover the money collected on it by levy and sale to a third party, as so much money had and received to his use, but there is no liability as for a trespass for goods seized and sold prior to the reversal, under an execution issued upon the judgment. *Field et al.* v. *Anderson*, 403.

ROADS. See HIGHWAYS.

ROAD TAX—"ROAD AND BRIDGE TAX."

HOW TO BE APPLIED, RESPECTIVELY.

Under sections 16 and 119 of the act of 1879. See TAXATION, 4 to 7.

SALES.

JUDICIAL SALES.

1. *Sale on execution—after defendant's death.* Where an execution is issued and levied upon real estate in the lifetime of the defendant therein, a sale after his death will be valid without any notice to his legal representative or revivor by *scire facias*. *Davis* v. *Moore*, 445.

2. At common law, if a defendant died after judgment against him, no execution could be issued, but the judgment had to be revived by *scire facias;* but by the statute an execution is authorized to be issued against

SALES. JUDICIAL SALES. *Continued.*

the real estate of a deceased defendant, upon notice to his legal representative, after the expiration of one year from his death, without reviving the judgment or decree. This remedy is concurrent with the common law proceeding by *scire facias*. *Davis* v. *Moore*, 445.

3. *Statute relating to sales, after defendant's death, construed.* Section 39, of chapter 77, Rev. Stat. 1874, provides that when a person shall die after a judgment or decree for the payment of money against him shall have been obtained in a court of record, execution may issue against his real estate, or a sale may be made under such decree or judgment, without reviving the same against his heirs or legal representatives, "*provided*, that no execution shall issue or sale be made until after the expiration of twelve months from the death of such deceased person; nor shall any sale be had on any *such* execution or decree until the person in whose favor the judgment or decree is sought to be enforced shall give to the executor or administrator, etc., at least three months' notice in writing of the existence of such judgment or decree before issuing execution or proceeding to sell:" *Held*, this provision has no reference to cases in which execution is issued and levied in the lifetime of the defendant in execution. The proviso relates only to executions to be issued after the death of the defendant, and sales on decrees not carried into effect in the lifetime of the defendant. Ibid. 445.

4. *Sale after return day is valid, if levy is made before.* Where an execution is levied upon real estate in its lifetime, the officer may sell the land after, as well as before, the return day of the writ, without the issuing of a *venditioni exponas*. Ibid. 445.

5. *Purchaser at execution sale—as to equities between the parties.* A purchaser of land at a sheriff's sale on execution, who is not a party to the judgment, need not concern himself in regard to any equities between the parties,—he is only bound to look to the judgment, the levy and the sheriff's deed, for the protection of his title. Ibid. 445.

SALE UNDER DEED OF TRUST.

6. *Of the proper notice thereof.* See MORTGAGES AND DEEDS OF TRUST, 3 to 6.

SERVICE OF NOTICE.

ON CORPORATION. See NOTICE, 1.

SERVICE OF PROCESS.

ON CORPORATIONS. See PROCESS, 2.

SPECIFIC PERFORMANCE. See CHANCERY, 15 to 18.

STATE AID FOR IMPROVEMENT OF RIVERS.

CONSTITUTIONAL INHIBITION.

As to railroads and canals—not applicable to rivers. See KANKAKEE RIVER IMPROVEMENT COMPANY, 7.

STATUTES.

EXPRESSING SUBJECT IN TITLE.

1. *Of the act concerning dogs.* The matter of imposing a license fee upon the owners or keepers of dogs is sufficiently expressed in the title of the act entitled "An act to indemnify the owners of sheep in cases of damage committed by dogs." *Cole et al.* v. *Hall*, 30.

REPEAL BY IMPLICATION.

2. A later statute will not be held to repeal a former one by implication, when the repugnancy between the provisions of the two is not such that they can not both stand together. *Barr* v. *The People*, 110.

CONSTRUCTION OF STATUTES.

3. *When affirmative words operate negatively.* It is a maxim generally true, that if an affirmative statute, which is introductive of a new law, directs a thing to be done in a certain manner, that thing shall not be done in any other manner, even though there be no negative words. Hence, a provision that certain things shall be done to constitute a license or authority, is equivalent to an express prohibition against the license or authority unless those things shall be done. *Diversey* v. *Smith*, 378.

PENAL STATUTE.

4. *Defined.* See PENAL STATUTE, 1.

STATUTES CONSTRUED.

5. *Interpleader—in proceeding by attachment—of the issues to be tried.* The act of 1869 construed, in *Laclede Bank* v. *Keeler*, 425. See ATTACHMENTS, 2, 3, 4.

6. *Kankakee River Improvement Company—of the duties of the company, under its original charter and the act of 1865 supplementary thereto. People ex rel. Attorney General* v. *The Kankakee River Improvement Co.* 491. See KANKAKEE RIVER IMPROVEMENT COMPANY, 1, 2, 3.

7. *Lien of a decree—on lands in another.* Effect of section 6 of the Divorce act. *Sapp* v. *Wightman*, 150. See LIENS, 4.

8. *Limitations as to writ of error—in cases arising under the Burnt Records act. McClure* v. *Walker et al.* 544. See LIMITATIONS, 11.

9. *Mandamus—in the Supreme Court, as an original proceeding—the statute* (Rev. Stat. 1874, p. 691,) *does not apply. People ex rel.* v. *Thistlewood et al.* 139. See MANDAMUS, 1.

10. *New trial in ejectment—under the statute—applies only to the trial courts. Lowe* v. *Foulke et al.* 58. See NEW TRIALS, 5.

STATUTES. STATUTES CONSTRUED. *Continued.*

11. *In partition—apportioning solicitor's fee.* The statute construed in *Cowdrey* v. *Hitchcock et al.* 262. See PARTITION, 1.

12. *Park commissioners—power to condemn lands—and for what purposes.* Section 12 of the act of 1869 construed in *West Chicago Park Commissioners* v. *Western Union Telegraph Co. et al.* 33. See PARKS, 1, 2, 3.

13. *Road tax—"road and bridge tax"—how to be applied, respectively, under sections 16 and 119 of the act of 1879. People, use of Town of Highland* v. *Suppiger et al.* 434. See TAXATION, 4 to 7.

14. *Sale on execution after death of defendant.* Sec. 39, of chap. 77, Rev. Stat. 1874, construed in *Davis* v. *Moore*, 445. See SALES, 3.

15. *Sale of land for taxes, and redemption therefrom—of a sale continued from time to time in the same year—regarded as only one sale.* Application of section 211 of the Revenue law. *Gage* v. *Parker*, 528. See TAXATION, 8.

16. *Stockholders in insurance companies—of the nature, character and extent of their liability, under the general law of 1869. Diversey* v. *Smith*, 378. See CORPORATIONS, 11, 12, 13.

17. *Change of venue from circuit court to county court—in cases of misdemeanor.* The statute construed in *Barr* v. *The People*, 110. See VENUE, 2.

STATUTE OF FRAUDS.

SALE OF LAND BY PAROL.

1. *Performance to take a case out of the statute.* The owner of several tracts of land sold one of them to his agent in this State in consideration that the latter would fence certain others of the remaining tracts, which the agent did according to the terms of the agreement, though no written contract was made, and in 1856 took actual possession of the tract so sold him, inclosed the same, and put a part of it in cultivation, and made valuable and lasting improvements thereon, and kept such possession until in 1879, when he conveyed the same to a woman for life, with remainder to the children of her body. It was *held*, that these facts were sufficient to take the case out of the Statute of Frauds, and that the conveyance vested in his grantees an equitable title to the premises conveyed. *Smith et al.* v. *West et al.* 332.

ACTS IN PERFORMANCE OF CONTRACT.

2. *To take a case out of the statute.* A court of equity interferes to enforce a contract within the Statute of Frauds only where there has been such acts of performance by the party asking relief, that he would suffer an injury amounting to a fraud by a refusal to execute the agreement. The right to relief in such cases rests not merely on the contract, but on what has been done in pursuance of the contract, and to prevent fraud. *Wallace* v. *Rappleye et al.* 229.

STATUTE OF FRAUDS.

ACTS IN PERFORMANCE OF CONTRACT. *Continued.*

3. The acts of a party, to take a case out of the Statute of Frauds, must clearly appear to have been done with a view to the agreement and upon its faith, and be such as would not have been done except for the agreement, and with a direct view to its performance. If the acts relied on might as well have been done with other views, and without the contract, they will not have the effect to take the case out of the statute. *Wallace* v. *Rappleye et al.* 229.

4. *In the particular case.* So, where, after an alleged parol agreement on the part of a father of an illegitimate child with the mother, to take and support the child and make it his heir, the mother gave up the child, which the father took and provided for, it was *held*, that the act of the mother in surrendering the custody of the child might as properly be referred to the father's agreement to take it and care for it in his own family as to his promise to make it his heir, and being for the mother's benefit, she could sustain no injury amounting to a fraud by a refusal to make the child an heir, and that such act of performance by the mother did not take the case out of the Statute of Frauds. Ibid. 229.

STOCKHOLDERS. See CORPORATIONS, 5 to 15.

STREETS.

WHAT BECOMES OF THE FEE. See HIGHWAYS, 1.

SUPERSEDEAS BOND.

WHEN RIGHT OF ACTION ACCRUES THEREON.

1. *Whether a dismissal of the writ of error amounts to an affirmance of the judgment—as affecting liability on the bond.* A dismissal of a writ of error for want of prosecution, where the court has jurisdiction of the case, is treated as an affirmance of the decree or judgment below, within the meaning of the usual conditions in a *supersedeas* bond; but the rule is otherwise when the writ of error is dismissed for want of jurisdiction. *Blair et al.* v. *Reading et al.* 375.

2. Where the order granting a *supersedeas* required bond to be given conditioned that the defendant should perform the decree against him in case it should be "affirmed by the dismissal of" the writ of error, and the bond given contained this condition and the words "in case the said writ of error shall be dismissed," and the writ of error was dismissed by this court for want of jurisdiction, it was *held*, that the condition must be understood as the same as the order—that is, that in case the decree should be affirmed by the dismissal of the writ, and that the dismissal of the writ for want of jurisdiction was not an affirmance of the decree so as to make the obligors of the bond liable thereon. Ibid. 375.

TAXATION.

ASSESSMENT IN THE WRONG TOWN.

1. *In pursuance of incorrect return by owner of property.* Where a person makes out and delivers to the assessor of the town in which he keeps his business office, a schedule of the amount, quantity and quality of all his personal property required to be listed for taxation, he will be bound by such return, though a portion of the property is required to be returned by him to the assessor of a different town, where it is also assessed. *People ex rel. Johnson* v. *Atkinson*, 45.

PROPERTY OF COUNTIES—EXEMPTION.

2. *The constitutional provision that the property of counties may be exempted* from taxation by general law, permits the implication that in the absence of any law exempting the same, such property is liable to taxation. Therefore, in the absence of any law exempting county property, a water tax may be assessed against the same by a city. *Cook County* v. *City of Chicago*, 646.

WATER TAX—IN CHICAGO.

3. *Exemption in favor of charitable and educational institutions—construction of an ordinance.* An ordinance of the city of Chicago provides, "that the commissioner of public works be and he is hereby authorized and empowered to remit and rebate the water tax or rates assessed against property used and occupied wholly for charitable and educational purposes:" *Held*, that the ordinance is not imperative that the commissioner shall remit or rebate the rates in any case, but leaves him to the exercise of his discretion in that respect. Ibid. 646.

ROAD TAX—"ROAD AND BRIDGE TAX."

4. *How to be applied, respectively—under sections 16 and 119 of the act of 1879.* The tax levied by the commissioners of highways, not exceeding fifty cents on each one hundred dollars' worth of taxable property, under section 16 of the Road law of 1879, so far as it relates to property within incorporated villages, towns and cities in which the streets and alleys are under the care of the corporation, is required to be paid over to the treasurer of such village, town or city, to be appropriated to the improvement of the streets, alleys and bridges in such corporation. *People, use of Town of Highland* v. *Suppiger et al.* 434.

5. But the "road and bridge tax" levied and collected under section 119 of the Road law of 1879, is a tax distinct from the road tax levied under section 16 of the same act, and the statute is imperative that such tax, including that collected on property within incorporated villages, towns and cities, shall be paid over, when collected, to the treasurer of the commissioners of highways, except the collector's commissions. The rule was different under the Road law of 1877. Ibid. 434.

6. The road and bridge tax required to be levied and collected by the commissioners of highways under section 119 of the Road law of 1879 is for certain specified purposes, such as for the making and repairing of bridges, the payment of damages by reason of the opening, altering and

TAXATION. ROAD TAX—"ROAD AND BRIDGE TAX." *Continued.*

laying out of new roads, the purchasing of necessary tools, implements and machinery for working roads, etc., and is a distinct tax from that levied and assessed under section 16 of the same act. The first must be paid in money, while the road tax may be discharged in labor on the roads. *People, use of Town of Highland* v. *Suppiger et al.* 434.

7. *Former decision.* The words, "except as provided in section 16," contained in the former statute, and which were thought, in *Baird* v. *The People*, 83 Ill. 387, to make it the duty of the collector to pay the "road and bridge" tax as well as the road tax proper, levied and assessed on property situated in villages, towns and cities, to the treasurers of such corporations, have been omitted from the revision of 1879, hence that case has no application under the law as now existing. Ibid. 434.

SALE OF LAND FOR TAXES—REDEMPTION.

8. *Of a sale from time to time in the same year—regarded as only one sale.* Where several judgments are rendered at the same time against land for State and county taxes and special assessments, and the land is sold under such judgments in July, August and September of the same year, the sale being continued through these months, this will be regarded as only one sale, and a party attempting to redeem from such sale must pay the penalty provided by the statute. Section 211 of the Revenue law has no application to such a case, but to a case where the same land is again sold for the taxes of a succeeding year. *Gage* v. *Parker*, 528.

PROOF OF REDEMPTION FROM TAX SALE.

9. *By the book of tax sales and redemptions kept by the county clerk.* See EVIDENCE, 14.

PURCHASER AT TAX SALE.

10. *Buys at his peril.* Purchasers at tax sales are bound to know at their peril that the supposed delinquent is in truth and in fact a delinquent,—that he has been lawfully assessed, and has failed to make payment. *Wilmerton* v. *Phillips*, 78.

WHO ARE "CORPORATE AUTHORITIES."

11. *To be given the power of taxation—West Chicago Park Commissioners.* See PARKS, 3.

LICENSE FEE ON DOGS.

12. *Is not a tax.* See DOGS—LICENSE FEE, 1.

INJUNCTION TO RESTRAIN COLLECTION OF TAXES.

13. *When it will lie.* See INJUNCTIONS, 1.

TELEGRAPH COMPANIES.

EMINENT DOMAIN.

Rights acquired by condemnation for telegraph purposes—and of the width of strip that may be acquired. Lockie v. *The Mutual Union Telegraph Co.* 401. See EMINENT DOMAIN, 3, 4.

TENDER.

AS TO PURCHASE MONEY.

On sale of land—what will excuse the omission to make tender on the day fixed by the contract. See CONTRACTS, 4.

TOWN PLAT.

ACKNOWLEDGMENT BY ATTORNEY IN FACT.

1. *Its effect.* Under the "Act providing for the recording of town plats," in force February 27, 1833, an attorney in fact was not authorized to acknowledge such plats, and a plat so acknowledged will not vest the legal title of the streets in the corporation. *Gosselin* v. *City of Chicago*, 623.

TRESPASS.

LEVY AND SALE ON EXECUTION.

1. *Effect of subsequent reversal of the judgment.* Where an execution, fair on its face, is issued on a judgment of a court of general jurisdiction having jurisdiction of the subject matter and of the parties, and levied on a stock of goods which are sold to a third party by the officer, the plaintiff in the execution will not be liable in trespass, notwithstanding such judgment may have been reversed after the levy and sale, for error. The acts being lawful when done, can not be made tortious by a reversal of the judgment. *Field et al.* v. *Anderson*, 403.

TRUSTS AND TRUSTEES.

WHETHER A TRUST EXISTS.

1. *So as to give a court of equity jurisdiction.* The mere delivery of property or money to one to be held by him until the performance of an act by another, when it is to be paid over to such other person, otherwise returned, does not, independent of other equitable circumstances, necessarily create a trust. It must either vest an equitable title in or create a lien in favor of the beneficiary, and this must be by agreement of the parties, or under such circumstances as equity will declare a lien exists. *Douglass* v. *Martin et al.* 25.

2. Where a friend of one under indictment places money in the hands of another, under a contract that if an attorney shall procure the acquittal of the accused, or his discharge from arrest, by *habeas corpus* or otherwise, the depositary is to pay the amount thereof to the attorney, otherwise to return the same to the person depositing it, there is no such a trust created as to entitle the attorney to sue for and recover the sum promised him, in a court of equity, the remedy being adequate at law. Ibid. 25.

TITLE HELD IN TRUST.

3. *Purchaser from trustee—when he will hold subject to equities against his grantor.* Where one person acquires real estate, but has

TRUSTS AND TRUSTEES. TITLE HELD IN TRUST. *Continued.*

the deed made to another for his benefit, the grantee is but a trustee for him, and subject to the same equities that would have applied against the beneficiary had the conveyance been made to him, and the same rule applies to a grantee of the trustee who does not pay for the property until long after the filing of a bill to impeach and avoid the several conveyances. *De Clerq et al.* v. *Jackson et al.* 658.

USAGE. See CUSTOM, 1.

USURY.

WHAT CONSTITUTES USURY.

1. *As to commissions paid to party obtaining loan.* Where the lender of money at the request of the borrower pays out of the money loaned commissions and other expenses of third persons, as agents of the borrower in procuring the loan, being of no benefit to the lender, this will not render the transaction usurious. It has been held otherwise where the commissions paid the agent inured directly to the benefit of the lender. *Kihlholz* v. *Wolf, Ex'x.* 362.

BURDEN OF PROOF.

2. *To establish usury.* The burden of proving a transaction usurious, rests upon the party alleging it. The usury must be established by a preponderance of evidence, or else the defence fails. Ibid. 362.

WHETHER RECOVERABLE BACK.

3. *When whole debt is voluntarily paid.* Usurious interest once voluntarily paid on a note or contract which has been fully paid and surrendered, can not be recovered back either in a court of law or equity. *Riddle et al.* v. *Rosenfeld et al.* 600.

APPLICATION OF USURY PAID.

4. *As to distinct and separate transactions.* Where five notes were given, each for a distinct and separate loan, procured at different times, and a note secured by deed of trust was deposited with the holder as collateral security for their payment, and all such original notes were paid and taken up except one, which was assigned, together with the collateral, it was *held*, on bill to foreclose the mortgage by the assignee against a subsequent purchaser of the mortgaged premises and others, that usurious interest voluntarily paid on the four original notes so taken up could not be allowed as a credit upon the remaining unpaid note, as the giving of the collateral did not convert these several notes into one transaction, but each remained a separate cause of action, the same as before. Ibid. 600.

VARIANCE. See PLEADING AND EVIDENCE, 2.

VENDOR'S LIEN. See LIENS, 7, 8.

VENDOR AND PURCHASER.

SALE OF LAND.

Of the various rights of the parties to the contract. Papin et al. v. *Goodrich et al.* 86. See CONTRACTS, 2 to 9.

VENUE.

CHANGE OF VENUE.

1. *From circuit court to county court—in cases of misdemeanor.* A change of venue, in a case of misdemeanor, on account of the prejudice of the circuit judge, may properly be granted to the county court of the same county, if that court has jurisdiction of the offence charged in the indictment. *Barr* v. *The People*, 110.

2. *The statute relating to, construed.* The amendatory act of 1881, relating to change of venue on account of the prejudice of the circuit judge, providing that upon the filing of the proper petition and affidavits, the cause, by operation of law, *may* be tried by any other of the circuit judges of the circuit, does not, in express terms, or by implication, repeal the provision of section 19 of the Revised Statutes of 1874, relating to the same subject, which provides that the venue may be changed to some other court of competent jurisdiction in the same county, as both may well stand together. Ibid. 110.

WAIVER.

WANT OF JURISDICTION IN CHANCERY.

1. *What will amount to a waiver of the objection.* See JURISDICTION, 10.

VENDOR'S LIEN.

2. *Waived by taking other security.* See LIENS, 7.

WATER TAX—IN CHICAGO.

EXEMPTIONS.

An ordinance construed. See TAXATION, 3.

WIDOW.

RENUNCIATION OF WILL.

What amounts to an election. See WILLS, 4.

WIDOW'S AWARD. See ADMINISTRATION OF ESTATES, 1.

WILLS.

RULE OF CONSTRUCTION.

1. In construing wills the intention of the testator must govern when ascertained, and this intention must be sought for in the language of the will itself, without the aid of extraneous evidence. *Blanchard* v. *Maynard et al.* 60.

WILLS. RULE OF CONSTRUCTION. *Continued.*

2. In the construction of a will to ascertain the intention of the testator, it is not proper to look at some particular clause or clauses alone, but it must be considered in all its parts, taken together. A construction should not be adopted, if possible to be avoided, that will deny effect being given to any clause thereof, but one should be given that would harmonize the several clauses, and give effect to each. *Bland et al.* v. *Bland et al.* 12.

CONSTRUCTION OF A WILL.

3. *By means of a decree of partition.* On a bill by a devisee under a will for a partition among the several devisees, and for a construction of the will, a decree of partition fully settling the rights of the parties under the will in conformity with its terms is a construction of the will and its various parts, as that is necessarily involved in determining such rights. *Cowdrey* v. *Hitchcock et al.* 262.

RENUNCIATION BY WIDOW.

4. *What amounts to an election.* The statute points out the mode by which a widow may renounce the provisions of a will made for her in lieu of dower, etc., and if she fails to pursue this mode within one year from the issue of letters testamentary, she is by the express terms of the statute deemed to have elected to take under the will. Her acceptance of the widow's award, however, though not entitled thereto under the will, under the belief that she is so entitled, can not be held to be an election to take under the statute and to renounce the provisions of the will. Before any presumption of an election can arise, it is necessary to show that the party acting or acquiescing was cognizant of his rights, and then, whether the party intended an election. Ibid. 262.

PROVISION IN LIEU OF WIDOW'S AWARD.

5. *And homestead—construed.* A devise was as follows: "I give, devise and bequeath to my * * * wife * * * the equal one-third of all my real and personal estate in lieu of dower rights, and of all other rights, interests and claims which she might have or claim in or to my estate, or any part thereof," and a devise of the residue of the estate to other persons: *Held*, the provision so made for the widow was in lieu of any claim to her specific award under the statute, and to any estate of homestead. Under such a devise the widow can take no interest whatever in the estate, except the one-third named in the will. Ibid. 262.

6. While it is true that a homestead, under the statute, is "exempt from the laws of conveyance, descent or devise," except as therein provided, yet when a testator devises certain property to his widow in lieu of dower and homestead, and she accepts the devise, she can not claim an estate of homestead, and it is not necessary that the devise should expressly show it is in lieu of homestead. It is sufficient if such intent is plainly manifested. Ibid. 262.

WILLS. *Continued.*

RENTS AND PROFITS.

7. *Whether rents of property before division are intestate assets.* Where an estate both real and personal is devised, one-third to the testator's widow, and one-third to his daughter, and the remaining third in fee to his executors, to pay certain legacies, and in case the last third is more than enough to discharge such legacies, such residue shall be proportionally divided among the legatees named, so that they may receive one entire third of the estate, no part of the estate can be treated as intestate. In such case the rents and profits of the one-third devised to the executors, which may have accrued before the sale of the property by them, will not pass by descent to the heir. *Cowdrey* v. *Hitchcock et al.* 262.

TIME OF APPRAISAL.

8. *Appraisal of property to adjust a division—at what time to be made—and of the time to control the valuation.* Where a testator provides that in the division and partition of his estate his daughter shall take one-third part of the estate, both real and personal, and that she may, if she so elects, take a certain house and lot on her share, paying his estate any excess in value of the same over the one-third of the estate given her, it is proper to have all the estate appraised and valued at the same time, in a proceeding for a partition. The daughter, to whom such right of election is given, is not entitled to the house and lot at a valuation to be ascertained at any other time than that at which the entire property of the estate shall be appraised, as the purpose is that she shall take one-third of the estate as the same may be valued at the time of the division. Ibid. 262.

TIME OF INVESTITURE OF TITLE.

9. A testator devised all his estate, real, personal and mixed, to two persons, in trust, to take care of and manage the same, declaring the trust should continue for ten years after his death, and no longer, and then provided: "It is my will that at the expiration of the trust hereinbefore declared, that is to say, at the end of ten years after my decease, all of my said estate then remaining, and the income thereof, shall be distributed and vest in my three sons," naming them, "and their heirs, and I do hereby give, devise and bequeath the same to them; but in case that either of my said three sons should die leaving no issue of their bodies, then I give, devise and bequeath my estate to the survivor of them:" *Held*, that no title under the will was intended to be vested in either of the testator's sons until ten years after his death, and that the widow of one of the sons who died before that time leaving no issue of his body, took no estate as heir of her husband, or dower as his widow, in the testator's real estate. *Blanchard* v. *Maynard et al.* 60.

WHAT PROPERTY WILL PASS—AND TO WHOM.

10. *Intermediate estate—qualified devise.* A testator provided in his will as follows: "First, after all my lawful debts are paid and dis-

WILLS. WHAT PROPERTY WILL PASS—AND TO WHOM. *Continued.*

charged, the residue of my estate, real and personal, I give, bequeath and dispose of as follows, to-wit: To my wife and five youngest children," naming them, "the farm and all its appurtenances thereunto belonging," giving a description of the farm. "All the rest, residue and remainder of my personal estate to my beloved wife and the five above named heirs,—that is to say, to my wife during her natural life, and to the minor heirs until they become of lawful age to account for themselves. To my other heirs and oldest children, heirs at law, I give and bequeath the sum of five dollars each," etc., and concluding, "and at the time of the youngest heir becoming of lawful age, the property, both real and personal, to be divided amongst my children, share and share alike:" *Held*, that the testator's intention was that the farm, as well as the personalty, should be divided and pass to all his children, share and share alike, when the youngest child became of age, and that the devise of the farm to the widow and five youngest children was not a devise to them absolutely, but a qualified devise to them until the youngest child should come of age, and that the limitation of the devise was the same as to both the real and personal estate. *Bland et al.* v. *Bland et al.* 12.

11. *When the word "heir" means child.* In such will the word "heir," in the clause providing that the property be divided when the youngest *heir* should become of age, means "child," and a partition may be had when the youngest child is of age, although one of the devisees may have died, leaving a minor heir. Ibid. 12.

CERTAINTY—ULTIMATE TAKERS.

12. *Whether will void for uncertainty—construction as to who are the ultimate takers—and as to the character of the intervening estate.* A testator provided by his will: "After all my debts are paid and discharged, that the residue of my property, both real and personal, shall remain as my estate as long as I have a living child,—the rents, use and interests of my estate, both personal and real, I dispose of as follows: First, to my wife I will and bequeath one-third of the net income of my estate, both personal and real, during her life, if she accepts it in lieu of dower. Secondly, I will and bequeath to my children the remaining two-thirds of the net income of my estate," naming each child, "during the life of their mother, and after the death of their mother the whole of the net income of my estate during their lives; and should any of my children die before the time for the final division of my estate, leaving heirs of their body, then their children shall take the share of their parent until the final settlement of my estate, and at the death of my last surviving child, my will is that my estate be equally divided between my grandchildren, they to share and share alike. Should any of my grandchildren die before the final division of my property, leaving heirs of their body, their children to take the share of their parent. I hereby appoint my son-in-law, Jonathan Royse, and my son, Asa F. Mather, to be executors of this my last will and testament." It was *held*, the will

WILLS. CERTAINTY—ULTIMATE TAKERS. *Continued.*

was sufficiently certain in its provisions to be enforced, and that the purpose of the testator was, that all his property, both real and personal, should be kept together as one entire estate, the net income of which, in the meantime, was to go, one-third to his wife during her life, and the remaining two-thirds thereof to his children, and upon the death of the wife the entire net income to go to his children until the death of his last surviving child, and on the happening of that event his whole estate to be equally divided among a class of persons described in the will, who might be living at such period of distribution,—the class who were to be the ultimate takers consisting of the grandchildren of the testator, or the children of such of the grandchildren as may have died before the time of distribution, including as well such grandchildren as may have been born after, as those born before, the death of the testator. *Mather et al.* v. *Mather et al.* 607.

DEVISE TO A CLASS.

13. *Who shall take.* The rule is, where a will carves out a particular estate which intervenes the death of the testator and the period of distribution of an estate devised to a class, then all persons belonging to such class, living at the time the estate is to be divided, are included, notwithstanding some of them may have been born after the death of the testator. Ibid. 607.

INTERVENING ESTATE—REMAINDER IN FEE.

14. *Of the sufficiency of the particular intervening estate to support a remainder in fee—devise of the net income of an estate.* It has been held that a devise of rents and profits will pass the land out of which the rents and profits are to arise. So where, as in this case, there is a devise of the net profits of an estate to the wife and children of the testator during their lives, that will operate as a devise of the property to them during their lives. And this particular estate so devised to the wife and children is of such character as will support a remainder in fee devised to another, or to a class of persons. In such case the estate in remainder will not vest in possession at the death of the testator so as to cut off any of those properly belonging to the class designated in the will as ultimate takers. Ibid. 607.

AS TO THE MANAGEMENT OF AN ESTATE.

15. *Until distribution—by whom.* In this case, in view of the fact that the net profits of the estate which were to go to the first takers under the will during their lives, must arise out of the personal as well as the real estate, and the direction that the entire estate should be kept together as the estate of the testator until the period for final distribution, and there was no specific direction in the will as to the persons in whose hands the estate should remain, or by whom it should be managed in the meantime, it was held to have been the intention of the testator that this duty should devolve upon the executors named in the will, under their general appointment as executors of his last will and testament. Ibid. 607.

WITNESSES.

COMPETENCY.

1. *Of attorney at law—as to matters coming to him as such.* An attorney at law may testify to facts coming to his knowledge while securing a debt of his client, in a contest between other parties than his client, the latter having no interest in the litigation. *Payne et al.* v. *Miller et al.* 442.

2. *Competency of wife in relation to conveyance to her by her husband.* On creditor's bill to set aside a conveyance of land by a husband to his wife, she is a competent witness to prove the consideration of the conveyance, and its good faith. Ibid. 442.

3. *Defendant in chancery for a co-defendant.* Where a party defendant in a suit in chancery disclaims any interest in the subject matter of the litigation and the result of the suit, he is a competent witness, both at common law and under the statute, for his co-defendants. Under the practice in chancery, a defendant might always testify for a co-defendant, if his evidence did not necessarily involve his own interest. *Smith et al.* v. *West et al.* 332.

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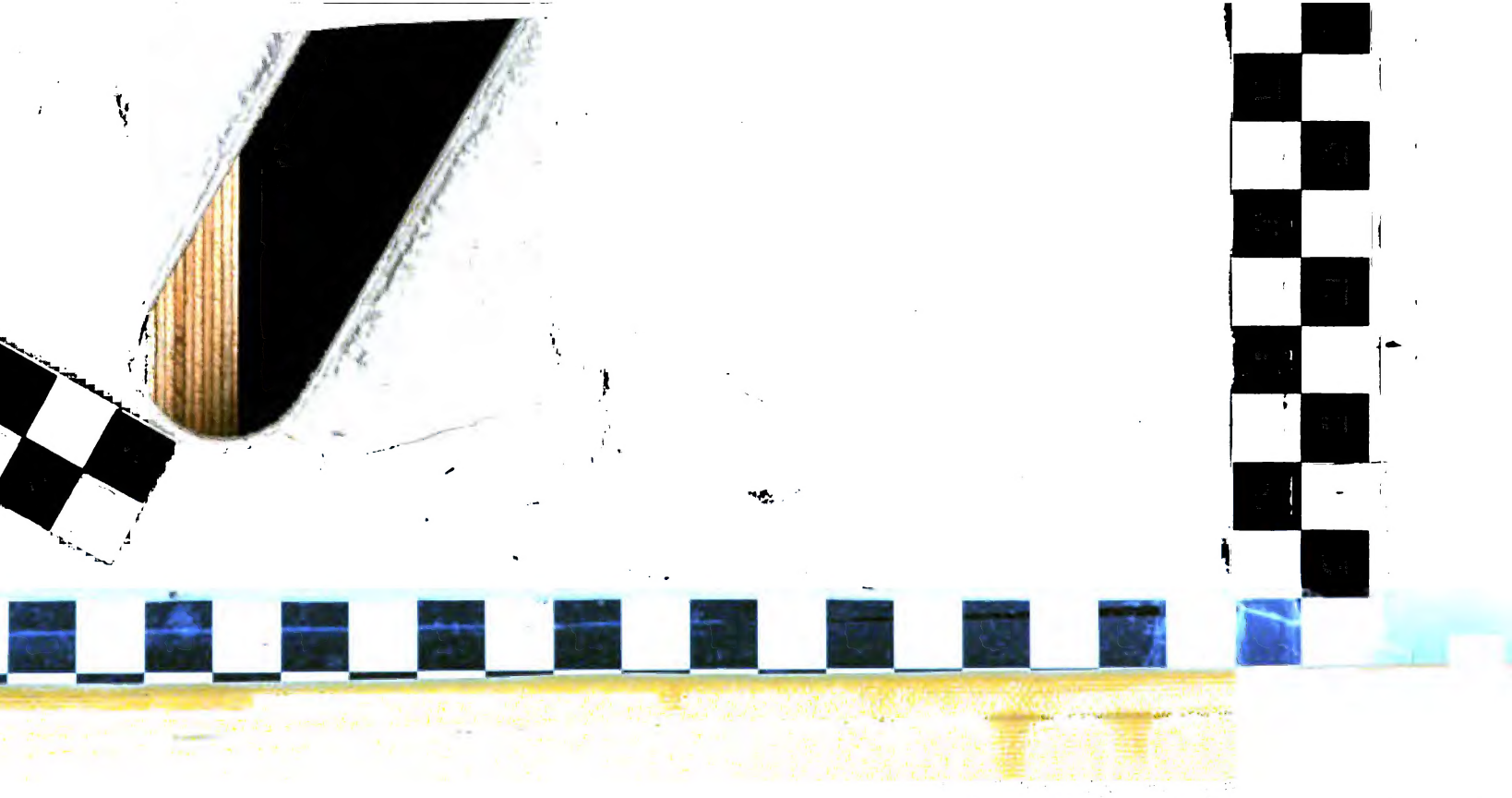
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